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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 148

REMINGTON RAND INC., *Intervenor-Petitioner,*

against

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. ETC. (Interhandel), *Plaintiff-Respondent,*

and

J. HOWARD MCGRATH, Attorney General of the United States as Successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, Treasurer of the United States, *Defendants-Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM P. MACCRACKEN, JR.,
Attorney for Petitioner.

Of Counsel:
URBAN A. LAVERY,
WILLIAM W. BARRON,
FRANK C. STERCK.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Remington Rand Inc., respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia entered in the above entitled cause March 29, 1951. (R. 403).

OPINIONS BELOW

The decision of the Court of Appeals (R. 400) is not reported. The memorandum of the trial court (R. 26) is not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court should exercise its power of supervision over the Court of Appeals for sanctioning departures from the usual and accepted course of judicial procedure—

a. In affirming the judgment and thereby approving the trial court's *sua sponte* order summarily requiring an immediate and separate trial of intervenor's claim which never would have required trial if plaintiff should fail in the main action as yet untried? (R. 396)

b. In not correcting the trial court for basing its order for separate trial upon unproved, unfounded, scandalous and impertinent suggestions of counsel that the property involved was "perishable" and that intervenor had "filed something in the nature of a strike suit"? (R. 396)

c. In accepting jurisdiction despite the fact that, without leave of the appellate court, the trial court entered a *nunc pro tunc* order in a belated effort to comply with Rule 54(b) of the Federal Rules of Civil Procedure five months after the appeal was perfected? (R. 413-414).

d. In misstating the record and erroneously assuming (1) that the judgment appealed from was final; (2) that the trial court properly amended its judgment when in fact it had lost jurisdiction by reason of the appeal (R. 400); (3) that the trial of the main action awaited the outcome of this appeal (R. 400); (4) that the trial court's findings of fact, which were contrary to conclusive and uncontradicted

written and oral evidence, were not clearly erroneous; and (5) that other erroneous rulings in excluding and admitting evidence were harmless? (R. 402).

2. Whether the decision of the Court of Appeals affirming the judgment and thereby approving the exclusion by the trial court of the Wehrli Memorandum is (a) in conflict with decisions of other Courts of Appeals on the same matter; (b) contrary to 28 U. S. Code, Sec. 1732; and (c) in disregard of Rule 43(a)?

3. Whether a judgment dismissing a complaint in intervention can become final only by compliance with Rule 54(b); and whether this Court should settle this hitherto unanswered and crucial question of Federal law which is causing conflict among the courts of appeals and hardship to litigants?

4. Whether the trial court, after appeal, in violation of Rule 60(a) and without leave of the appellate court, had jurisdiction to enter its *nunc pro tunc* order correcting its judgment in an effort to make it final; and whether the decision below, accepting jurisdiction to review the judgment, is in conflict with decisions of other courts of appeals?

STATUTES AND RULES INVOLVED

28 U.S.C. § 1732 provides:

> Sec. 1732. Record made in regular course of business.
>
> In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term 'business,' as used in this section includes business, profession, occupation, and calling of every kind. June 25, 1948, c. 646, 62 Stat. 945.

Rule 42(b) of the Federal Rules of Civil Procedure provides:

(b) SEPARATE TRIALS. The court in furtherance of convenience and to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim or third-party claim, or any separate issue or of any number of claims, cross-claims, third-party claims, or issues.

Rule 43(a) provides:

(a) FORM AND ADMISSIBILITY. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the general courts of general jurisdiction of the state in which the United States Court is held. In any case, the *statute or rule which favors the reception of the evidence* governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner. (Emphasis supplied.)

Rule 54(b) provides:

(b) JUDGMENT UPON MULTIPLE CLAIMS When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an

express direction for the entry of judgment. In the absence of such determination and direction, *any order or other form of decision, however designated,* which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims. (Emphasis supplied.)

Rule 60(a) provides:

(a) CLERICAL MISTAKES: Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected *with leave of the appellate court.* (Emphasis supplied.)

STATEMENT

This action was brought by the respondent, Societe Internationale Pour Participations Industrielles et Commerciales, S.A., Etc., hereinafter referred to as Interhandel, under Section 9 of the Trading With the Enemy Act (50 U.S.C. App. Sec. 9) to recover certain vested property including more than 90 per cent of the stock of General Aniline and Film Corporation, hereinafter referred to as GAF.

Petitioner was permitted to intervene in that proceeding to establish its right to purchase the GAF stock from Interhandel for the sum of 25 million dollars cash, if, as and when Interhandel recovered the stock and other assets claimed by it.

Both Interhandel and the Office of Alien Property opposed petitioner's intervention and sought to force this petitioner out of the case by numerous dilatory and harassing tactics, including a petition for a writ of prohibition,

which was denied, and an appeal, which was dismissed on motion.[1]

These tactics included unwarranted assertions that the property of GAF was "perishable" and that "Intervenor had filed something in the nature of a strike suit". (R. 396). These induced the trial court *sua sponte* to sever the intervenor's claim and set it down for immediate trial before answers had been filed either to the complaint of intervenor or to the main suit.

Petitioner was allowed scant time to prepare for a trial involving intricate questions of Swiss law, the translation of numerous exhibits, including Interhandel's corporate minutes and the taking of depositions both here and abroad. The trial began on February 6, 1950, and concluded March 28, 1950. In mid-trial the court granted a recess in order that depositions might be taken in Paris.

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[1] These included the following:

July 25, 1949, Leave granted to file complaint in intervention (Orig. R. 2091) but entry of order deferred 10 days to permit application to Court of Appeals for writ of prohibition (Orig. R. 2105).

Aug. 3, Petition for writ of prohibition filed. (Orig. R. 2091). See intervenor's memorandum (Orig. R. 2090-2098).

Aug. 16, 1949, Writ of Prohibition denied by Court of Appeals (Orig. R. 2092).

Oct. 26, 1949, Motion of Office of Alien Property for order that defendants and plaintiffs are entitled to settle action regardless of right which intervenor has or asserts to contrary (R. 393).

Dec. 14, 1949, Motion to dismiss complaint in intervention (Orig. R. 2110).

Dec. 21, 1949, Motion denied (R. 394).

Dec. 30, 1949, Office of Alien Property moved orally for a rehearing (Orig. R. 2127).

Jan. 4, 1950, The Office of Alien Property filed a written motion for a "reconsideration" which was denied Jan. 18, 1950. (R. 398.) The defendants appealed to the Court of Appeals (C. A. No. 10650) but their appeal was dismissed on petitioner's motion.

Jan. 18, Motion to dismiss complaint in intervention (Orig. R. 2140).

Jan. 23, 1951, Mandate of Oct. 30, 1950, from U. S. C. A. dismissing appeal on order of Dec. 21, 1949; filed. (Docket Entry App. p. 27 post.)

In the course of the trial the intervenor introduced numerous written exhibits, Nos. 1-55 (R. 319-391), in order to prove the existence of an oral contract, valid under the law of Switzerland, where it was made.

Intervenor's Exhibit No. 17 A.A. (R. 334) is from the minutes of a two-day meeting of Interhandel's Board of Directors and is devoted entirely to a discussion of the matter of making a binding offer to the intervenor for the sale of GAF shares.

These minutes of May 18 furnish the background as well as the authority for Interhandel's binding offer of June 6, 1946, to sell its GAF shares to petitioner for $25,000,000 (R. 336, 337).

Negotiations followed. The intervenor made a counter-proposal (R. 337) to accept the offer at a price of twenty-five million dollars ($25,000,000). This counter-proposal the Board of Interhandel found acceptable (R. 337).

After many conferences Interhandel, on June 6, 1946, made its binding oral offer or declaration, the conclusive written evidence of which is the Wehrli memorandum. (Intervenor's Ex. 55, R. 391). The trial court refused to admit this memorandum in evidence (Orig. R. 2318). Dr. Ulrich Wehlri is an official of the Union Bank of Switzerland (R. 148) which represented intervenor in Interhandel conferences (R. 150). His immediate superior in the bank was Mr. F. Richner, general manager (R. 148). It was Richner's regular and invariable practice to require his assistants to furnish him with a memorandum made in the regular course of the business of the Union Bank of Switzerland. (R. 146, folio 991, 992) (Orig. R. 2278, 2281). The memorandum was a true and accurate account of what was said at the conference of June 6, 1946 (R. 147).

This offer was accepted May 5, 1947 by the Remington-Rand group (R. 326-327) before the time limit fixed by Interhandel's notice of April 21, 1947 had expired.

The trial judge in announcing his decision requested counsel to prepare findings of fact and conclusions of law and judgment. (R. 26). Those submitted by counsel for

Interhandel were adopted *verbatim* and almost *in toto* (R. 31-37).

The trial court rendered judgment dismissing the petitioner's complaint in intervention (R. 37-38) but made no direction under Rule 54(b) for the entry of final judgment and no express determination that there is no just reason for delay. Nevertheless petitioner appealed (Orig. R. 2347; docket entry, App. p. 26, docket entry).

The trial court, after the case was set for argument in the appellate court, entered a *nunc pro tunc* order on January 4, 1951, (R. 413-414) endeavoring thereby to make final its judgment of April 26, 1950.

The appellate court in affirming the judgment not only ignored these errors but misread the record, as shown by its misstatements of the facts when it said:

> Entry of the judgment was directed upon an express determination by the court that there was no just reason for delay (Fed. R. Civ. P., 54(b)).[2] The main action yet untried awaits the outcome of this appeal (R. 400).

REASONS FOR GRANTING THE WRIT

The decision below is erroneous. It violates Rules 42(b). 43(a), 54(b) and 60(a) of the Federal Rules of Civil Procedure. It is in direct conflict with the decisions of the Second Circuit in *Waters* v. *Kings County Trust Co.*, 144 F. 2d 680; *cert. denied* 323 U. S. 769; *rehearing denied* 323 U. S. 817, and of the Third Circuit in *U. S.* v. *Quick*, 128 F. 2d 832, and *U. S.* v. *Riccardi*, 174 F. 2d 883. Nor can the decision here be reconciled with the court's own holdings in *David* v. *District of Columbia*, 187 F. 2d 204, and *Shokuwan Shimabukuro* v. *Higeyoshi Nagayama*, 140 F. 2d 13.

In addition, the affirmance of the judgment so far sanctioned such departures by the District Court from the usual and accepted course of judicial proceedings as to call for the exercise of the supervisory power of this Court.

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[2] This statement is completely inaccurate unless this Court should find that the *nunc pro tunc* order of the trial court was within that court's power.

The case also presents important questions of federal law, one of which involves the construction and proper application of 28 U.S.C. Sec. 1732, "record made in regular course of business", which has not been but should be decided by this Court.

Another involves the question whether a judgment dismissing a complaint in intervention is final and appealable absent compliance with Rule 54(b). This question was left unsettled by this Court in *Dickinson* v. *Petroleum Conversion Corporation,* 338 U. S. 507. This court should resolve the doubt and uncertainty that still impedes the administration of justice in intervention proceedings.

I.

A. The trial court of its own motion prematurely ordered an immediate, separate trial of intervenor's claim for relief. Proper procedure required a separate trial only in the event that plaintiff should prevail in the main action. Interhandel of course cannot deliver to petitioner shares of GAF held by the Office of Alien Property until Interhandel's right to the return of those shares is established in this action. Therefore there was no purpose to be served by the trial court's order.

Rule 42(b) of the Federal Rules of Civil Procedure provides:

> "The court *in furtherance of convenience or to avoid prejudice* may order a separate trial of * * * any separate issue or any number of claims * * * or issues." (Emphasis supplied.)

The rule is intended to further convenience and avoid delay[3] and to serve the ends of justice.[4]

"If a separate trial of part of the issues may make unnecessary the trial of other issues, it is only reasonable to

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[3] 3 Barron & Holtzoff, *Federal Practice and Procedure,* Sec. 943, p. 664; *Bruckman* v. *Hollzer,* 152 F. 2d 730.

[4] *Container Co.* v. *Carpenter Container Corp.,* 9 F. R. D. 89.

follow the course which saves the time of the court and reduces the expense of the parties.'"[5] This Court has said that the separate trial of issues should be ordered only in exceptional instances where there are special and persuasive reasons for departing from the usual practice of trying all issues of a case at one time.[6]

In the case at bar the trial court might well have served convenience, saved expense and avoided prejudice by postponing the trial of intervenor's claim until after the trial of the main action. Then, if the court rejected Interhandel's claim for the return of the GAF shares, intervenor's claim would never have come to trial. But the trial court, ignoring this clearly marked path, of its own motion, chose another course. It ordered a separate and immediate trial of the intervention issues. Thus, Rule 42(b) was misused to produce precisely the consequences which the rule seeks to avoid, namely, delay and inconvenience to all parties and serious prejudice to the intervenor.

This initial departure from sound procedure set in motion a chain of bizarre events which, as will be seen, involved the trial and appeal in a labyrinth of error. Without a separate trial of issues there would have been no separate judgment; no occasion for an express finding of "no just reason for delay" under Rule 54(b); no appeal; no makeshift *nunc pro tunc* order; and no question of jurisdiction.

B. The District Court's order for a separate trial was prompted by suggestions of counsel that the GAF property required immediate protection "from deterioration or loss" and that intervenor "had filed something in the nature of a strike suit." (R. 396). The latter suggestion is a gratuitous slander entirely unsupported by the record. The other suggestion, that the property needed immediate

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[5] 3 Barron & Holtzoff, Sec. 943, p. 665; *Canister Co.* v. *National Can Corp.*, 3 F. R. D. 279; *Rickenbacher Transp.* v. *Pennsylvania R. Co.*, 3 F. R. D. 202.

[6] *Arnold* v. *U. S.*, for use of W. B. Guimarin & Co., 263 U. S. 427; *Miller* v. *American Bonding Co.*, 257 U. S. 304.

protection, is contrary to fact. GAF then, as now, was being successfully and profitably operated by a management selected and instructed by the Office of Alien Property.[7] It is important that a District Court should not act upon mere suggestion or surmise. A court acts upon evidence, not upon guesswork or suspicion engendered by unsupported and unfounded statements of counsel.

A trial is a judicial examination and determination of the issues. Where the facts must be proved or submitted to the Court, the judge cannot assume facts not generally known, and in this regard cannot go further than a jury. *Brown* v. *Piper*, 91 U. S. 37; *Leong Kim Wai* v. *Burnett*, 23 F. 2d 789; *In re Rivkin*, 216 F. 218, 222. See also *Southern Shipyard Corporation* v. *The Tugboat Summitt, Inc.*, 294 F. 284; *Holland Banking Co.* v. *Continental Nat. Bank*, 9 F. Supp. 988.

C. The trial court without leave of the Court of Appeals entered its *nunc pro tunc* order (R. 413-414) amending the record five months after the appeal had been taken and eleven days before it was argued.

This order was the exercise of a power beyond the jurisdiction of the trial court. The appeal had taken away the District Court's jurisdiction. Sole jurisdiction of the case resided in the appellate court. This is too obvious to war-

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[7] The Attorney General of the United States testifying before a subcommittee of the House Committee on Appropriations, on February 19, 1951, said in part, "This is the largest company that Alien Property has and is operating. We think the value of the property can run anywhere from $60 million to $100 million. The Government ought to dispose of the property as soon as it can. It should be put back into private hands." (Hearings before the subcommittee on Appropriations, House of Representatives, subcommittee on the Department of Justice (1951, pp. 10, 15.)

Again in his testimony he said, "I would not hesitate to recommend some type of settlement" (p. 12). * * * "I anticipate that the net profits of the company for the year 1950 will be in the neighborhood of $5 million—$5 to $6 million (pp. 12, 18, 19). The picture is continually improving but it is improving because of the defense program and it can be expected to go the other way when this program is behind us." (p. 12).

rant extended discussion. The point will be treated briefly in subdivision IV, p. 21, post.

D. The court below misread the record and erroneously assumed (1) that the judgment was final; (2) that the *nunc pro tunc* order was proper; (3) that the trial of the main action waits upon the outcome of this appeal (R. 401); (4) that other rulings excluding evidence were harmless (R. 402).

The error in deeming the judgment final is discussed in subdivision III (p. 17, post); the *nunc pro tunc* order in subdivision IV (p. 21, post); the error in excluding the Wehrli memorandum in subdivision II immediately following.

More is unnecessary to demonstrate that the Court of Appeals in affirming the judgment departed from the usual and accepted course of judicial proceedings and so far sanctioned such departures by the District Court as to call for the exercise of the supervisory power of this Court. See *Duke Power Co.* v. *Greenwood County,* 299 U.S. 259; *Radio Corp. of America* v. *Federal Trade Commission,* 71 S. Ct. 806.

In the case at bar, as in *Duke Power Co.* v. *Greenwood County, supra,* "the climax of misunderstanding was reached. * * * We thus have a situation in which both courts have failed to act in accordance with the standards of proper procedure." *Id.* p. 267.

"Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure. There is no exigency here which demands that these requirements should not be enforced." *Id.* p. 267.

II.

The Decision of the Court of Appeals approving rulings of the trial court which excluded evidence vital to the issues is in conflict with the decisions of other courts of appeals on the same matter; is contrary to Rule 43(a) of the Fed-

eral Rules of Civil Procedure; and involves an important question of Federal law which has not been but should be settled by this court.

This discussion will be limited to the Wehrli memorandum (Ex. 55, R. 391-3) which is convincing and conclusive evidence of the terms and conditions of the oral contract upon which petitioner relies. This the trial court excluded (Orig. R. 1035). This the Court of Appeals held harmless, if error (R. 403). The memorandum was made in the regular course of business (R. 146) at the express direction of Mr. Richner, General Manager of the Union Bank of Switzerland and pursuant to his invariable rule to require his assistant, Dr. Ulrich Wehrli, to report conferences attended (R. 153). The memorandum was prepared within a day or two following the conference of June 6, 1950 (R. 152), and therefore was admissible as proof of the facts recorded for two reasons.

1. It fully meets the requirements of 28 U.S.C. 1732, commonly known as the "shop book rule".

2. It was a true and accurate memorandum recording the past recollection of the witness and, therefore, if not in all respects fulfilling the conditions of admissibility under the "shop book rule", was admissible as "past recollection recorded".

This memorandum was indeed not unlike the documentary evidence held admissible in *Waters* v. *Kings County Trust Co.*, 144 F. 2d 680, *certiorari* denied, 323 U. S. 769, *rehearing denied*, 323 U. S. 817.

The only prerequisite to the admissibility of a writing under 28 U.S.C. Sec. 1732 is that the entries must have been made in the usual course of business as the record of acts or transactions then occurring. *U. S.* v. *Quick*, 128 F. 2d 832.

Therefore we submit that the exclusion of this evidence was error and the holding of the court below that if error, it was harmless, is in conflict with the decisions of the sec-

ond and third circuits. It also should be noted that the question of the proper construction of 28 U.S.C. Sec. 1732 involves an important question of federal law which has not been but should be decided by this Court.

Before discussing the second reason or principle upon which the Wehrli memorandum is admissible, a brief recapitulation of its evidentiary background may be helpful.

Petitioner claims the right to purchase the GAF shares under an oral contract which is valid under the law of Switzerland (R. 107). The terms and conditions of this contract are reflected in two documents: (1) the minutes of Interhandel's Board of Directors authorizing the June 1946 offer (R. 336-337), and (2) the Wehrli memorandum of the conference of June 6, 1946 at which the proposal was made (R. 391-393). These were the significant and controlling documents with respect to the terms and conditions of the contract.

Oral evidence at the trial, four years after the event, was directed to the interpretation of the agreement; or to its intended scope and effect; or to the acts and conduct of the parties which might disclose either that the contract was not entered into or that its conditions were conditions precedent and were not performed. No evidence in the record contradicts the factual integrity of the Wehrli memorandum. Its circumstantial trustworthiness is convincing. The deposition of Richner (R. 147) that it was a true and accurate record of the facts recorded likewise stands uncontradicted.

Consequently the exclusion of this memorandum could not possibly be harmless error.

We have shown, we think, that it was admissible under the "shop book rule" as a record made, kept and required to be made and kept in the regular course of the business of the Union Bank of Switzerland. But if by any technical shortcoming it could be excluded under that rule, it should have been received as the truthful and accurate record of the facts of the conference made by the recorder within a

day or two after the conference (R. 152, 153) when the events were fresh in his mind.

We cannot expect a busy bank officer, four years later, to accurately remember all the details of the conferences attended. This was an important conference. Dr. Wehrli testified, "I wanted to be precisely sure what was said on that date in order to communicate it to the Remington Rand group" (R. 154). The truthfulness of the memorandum is admitted by Interhandel's general manager, Germann, who was asked by the trial court (R. 251):

> Is this (memorandum) an accurate summary or statement of Interhandel's declaration to Mr. Richner and Dr. Wehrli on June 6, 1946 * * * ?
> The witness: Yes, Your Honor. * * *

What tribunal would hesitate under these circumstances to impute verity to such a memorandum? Who in later years would prefer the uncertain and fallible recollection of a witness to his written record made at the time of the event?

Wigmore notes that historically there has been much confusion in the decisions with respect to the admission or rejection of a contemporaneous memorandum made by a witness as a record of past recollection (3 Wigmore on Evidence, 3d Ed. 1940, Sec. 734, p. 64). He then discusses the practical requirement that the record must have been made at about the time of the events recorded and the tests of accuracy and identity that should be applied.

"The principle on which the use of a past recollection rests * * * is clearly that of necessity. To reject such a record would be to reject the best and frequently the only means of arriving at the truth!" (Wigmore Sec. 738)

This Court in *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 236, indicated accord with Professor Wigmore's views with respect to past recollection recorded and cited section 761 of his work.

The holding of the Court below is squarely in conflict with *U. S.* v. *Riccardi,* C.A. 3d 1949, 174 F. 2d 883. In the *Riccardi* case the opinion carefully distinguishes between "present recollection revived or refreshed," and "past recollection recorded." There a witness was permitted to refresh her recollection by using a memorandum of the items of property which the accused was charged to have stolen. Only one sheet of the original notes was available and the witness was permitted to testify that she had made a typewritten copy of the longhand notes as to the numerous items stolen from her house, and one page of longhand notes was admitted in evidence. The court said in part:

> Since the purpose of the writing is to activate the memory of the witness, there is always the possibility, if not probability, that the writing will exert a strong influence upon the direction of the memory, that is, the nearer the writing to the truth the lesser the deviation of the witness' memory from the truth. (p. 888.)

In the *Riccardi* case the third circuit approved the ruling of the District Court admitting the evidence and receiving into the record the sheet of longhand notes. In the case at bar, the court below approved the ruling of the trial court excluding the evidence. Not only does the decision of the Court below conflict with the *Riccardi* decision, but it is squarely in conflict with its own decision in *Shokuwan Shimabukuro* v. *Higeyoshi Nagayama,* App. D. C. 1944, 140 F. 2d 13. There the circumstances were quite comparable. The witness testified that he had no present recollection of the facts at the time of the trial but that he knew that the memorandum was true when he made it. The court said:

> * * * But the rule as to admissibility of books of account does not apply to a case where the witness who made the entry testifies that he had no present recollection of the facts they are offered to prove, but that he knows the entries were true when he made them. This is a form of past recollection recorded *and is admissible as such.* (p. 16.) (Emphasis supplied.)

Rule 43(a) provides that "the statute or rule which favors the reception of the evidence governs." By promulgating this rule, this Court established a more liberal rule than theretofore obtained. Technical rules are no longer effective to exclude trustworthy evidence if there is any sound rule or reason for its admission.

Willard Helburn Inc. v. *Spiewak,* 180 F. 2d 480, involved a letter written by plaintiff's treasurer to defendant, appellee. The letter confirmed a telephone call, and reported the purchase of sheepskins for appellee. The District Court admitted the letter but considered it simply a self serving declaration not binding on defendant. The Court of Appeals for the Second Circuit reversed the trial court for not accepting the memorandum "as a timely written memorandum stating to the appellee the appellant's understanding of the oral contract they had made." (p. 482).

We submit, therefore, that the exclusion of the Wehrli memorandum violated Rule 43(a) and was contrary to 28 U.S.C. Sec. 1732. The court below accepted and approved an obsolescent and outmoded rule and disregarded the modern and salutary trend.

III.

The decision below in other respects is in conflict with decisions of other United States courts of appeals and involves an important question of federal law which has not been but should be settled by this Court.

The amendment of Rule 54(b) of the Federal Rules of Civil Procedure became effective March 19, 1948. This rule fixes the standard by which the finality and appealability of a judgment is determined when that judgment decides one or more but less than all of the issues of a case.

The rule is clear and precise. If the judgment is to be final, the court must do two things: (1) it must make an express determination that there is no just reason for delay, and (2) it must make an express direction for the entry of judgment. In the absence of such determination and

direction any order or other form of decision does not determine the action as to any of the claims and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.[8]

As this Court said in *Dickinson* v. *Petroleum Conversion Corp.*, (1950) 338 U. S. 507, the obvious purpose of this amendment "is to reduce as far as possible the uncertainty and the hazard assumed by a litigant who either does or does not appeal from a judgment of the character we have here. It provides an opportunity for litigants to obtain from the District Court a clear statement of what that Court is intending with reference to finality, and if such direction is denied, the litigant can at least protect himself accordingly."

In the *Dickinson* case, *supra*, the judgment was rendered before the effective date of Rule 54(b). The amended rule, therefore, was not applicable. This Court in holding that a judgment dismissing a complaint in intervention was final and appealable, after noting the effect of the amended rule on future cases, carefully limited its opinion to the particular case then under consideration.

Thus was left undecided an important question of federal law which has not been but should be settled by this Court. The courts, the Bar, and litigants in federal courts should not be left in doubt that the requirements of Rule 54(b) apply to separate judgments dismissing complaints in intervention.

Circuit Judge Charles E. Clark, reporter to the Advisory Committee on the rules, makes this plain:[8a]

> While this decision, (Cohen v. Beneficial Indus. Loan Corp., 337 U. S. 541) considered alone, still leaves the important matter of appealability in too much uncertainty for the comfort of counsel forced to take imme-

[8] 3 Barron & Holtzoff, *Federal Practice and Procedure*, Sec. 1193, p. 16.

[8a] Clark, Experience Under the Amendments to the Federal Rules of Civil Procedure, 1950, Revised Edition, Pamphlet, Federal Rules of Civil Procedure and New Title 28, U. S. Code, pp. 20, 21. See also, *id.*, p. 8.

diate actions, yet it does suggest a way out, indeed the very way taken by the amendment to Rule 54(b); it is perhaps regrettable that the Court did not seize the opportunity to clarify the situation by pointing out the interconnection. For that amendment (to Rule 54(b)) builds on the same underlying thesis as does the decision, but with the added purpose of affording counsel some principle or presumption upon which they can act without too great peril. Under it a court order short of a judgment terminating all aspects of the litigation is held interlocutory and subject to revision by the judge unless he has made an express direction for the entry of a final judgment upon a part of the litigation accompanied by an express determination that there is no just reason for delay as to it. This does not, as has at times been suggested,[55] put in the hands of the trial judge any improper or additional power; it simply guarantees that his existing powers will be exercised not inadvertently or by default, but openly to the gaze of all who are interested. And it gives scope for the proper operation of the undoubtedly equitable Cohen principle in a way which does not leave the parties in hopeless uncertainty.[56]

Judge Clark added this footnote:

Since the district court was always entitled to hold its order subject to review until the entry of a final judgment, this simply states a method of interpretation of an otherwise ambiguous order. Except in the one instance where a district judge has erroneously determined that there is no just reason for delaying the entry of a final judgment as to some obviously interlocutory matter, there would thus seem no possibility of question as to the district court's acts.

The decision below, which assumed that the trial court's judgment dismissing the complaint in intervention was final and appealable, is in conflict with the decisions in *Flegenheimer* v. *Manitoba Sugar Co.*, C.A. 2d, 1950, 182 F. 2d 742; *Etten* v. *Kauffman*, C.A. 3d, 1950, 179 F. 2d 302; *Winsor* v. *Daumit*, C.A. 7th, 1950, 179 F. 2d 475; and *Kauf-*

man and Ruderman Inc. v. *Cohn & Rosenberger,* C.A. 2d, 1949, 177 F. 2d 849.

The case of *Flegenheimer* v. *Manitoba, supra,* decided that an order dismissing a third-party claim was not final and appealable.

The *Etten* v. *Kaufman* and *Winsor* v. *Daumit* cases, as well as *Robinson Brothers and Co. Inc.* v. *Tygart Steel Products Co.,* C.A. 3, 1950, 184 F. 2d 534, all held that compliance with the requirements of Rule 54(b) was an indispensable prerequisite to the jurisdiction of the appellate court. For lack of such compliance the appeal was dismissed in each of these cases.

Furthermore the decision of the court below is squarely in conflict with its own holding in *David* v. *District of Columbia,* C.A. D.C. 1950, 187 F. 2d 204. There the court on its own motion held that an order of the trial court dismissing a third-party complaint was not final or appealable in the absence of an express finding of no just reason for delay. This case was decided after the decision of this Court in the *Dickinson* case. The contrary holding in the case at bar is the more perplexing because one Circuit Judge participated in both decisions of the Court of Appeals.[9]

In the instant case, the Court below devoted one solid hour to hearing argument on the question of its jurisdiction (R. 399) and then made no further reference to the question but assumed that the judgment was final and that jurisdiction existed (R. 400).

This conflict, we submit, should be resolved by this Court, and the Court below reassured that a separate order or judgment dismissing a third-party claim or complaint in intervention, is not final and is appealable only upon the trial court taking the two steps required by Rule 54(b).

Here the petitioner, uncertain as to the finality of the judgment entered after premature trial, appealed, although

[9] In the case at bar the appeal was heard by Circuit Judges Edgerton, Proctor and Fahey. The appeal in *David* v. *District of Columbia* was heard by Circuit Judges Clark, Bazelon and Fahey.

the trial court had failed to take the steps required by the rule.

IV.

The final question here presented is related to the question last discussed. In the case at bar the trial court made no finding of "no just reason for delay" when the judgment was rendered. (R. 37-38). Five months later, after the appeal had been taken and was ready to be argued, the trial court entered a *nunc pro tunc* order making a finding that there was "no just reason for delay." (R. 413-414).

We submit that under Rule 60(a) the trial court, without leave of the appellate court, had no power to amend its judgment by making the finding that there was no just reason for delay.

Such an order in essence was but an attempt to give to the Court of Appeals jurisdiction where otherwise no jurisdiction existed. The Court of Appeals by its decision accepted the regularity of the order, assumed that the judgment was final (R. 400), and thereby gave sanction and validity to the *nunc pro tunc* order.

The decision of the Court below is in conflict with the decisions of other courts of appeals and probably in conflict with the applicable decisions of this Court.

This Court in *Heitmuller* v. *Stokes*, 256 U. S. 359, held that a court is without jurisdiction to take any further action with respect to its judgment after an appeal therefrom has been perfected. In *Roemer* v. *Simon*, 91 U. S. 149, this Court said that the proper practice is to apply for remand of the record for further proceedings in the trial court.

This is the procedure which this Court has prescribed by Rule 60(a) for just such occasions. *Kaufman & Ruderman Inc.* v. *Cohn & Rosenberger*, C.A. 2d 1949, 177 F. 2d 849.

Upon the taking of the appeal, all power and control over the right to prosecute an appeal terminate so far as the trial court is concerned. *Chisholm* v. *Cissel*, 12 App.

D.C. 180; *Goldsmith* v. *Valentine*, 35 App. D.C. 299; *Rothschild* v. *Marshall*, 51 F. 2d 897. The trial court's jurisdiction cannot be restored by a *nunc pro tunc* order. *In re Bills of Exceptions*, 37 F. 2d 849; *Michigan Ins. Bank* v. *Eldred*, 143 U. S. 293.

Therefore the decision of the Court below is in conflict with the applicable decisions of this Court; in conflict with the decisions of other courts of appeals; and in conflict with its own former decisions.

CONCLUSION.

The opinion of the Court below fails to disclose the want of jurisdiction in that Court or in the district court. It fails to reflect its own departures from the usual and accepted course of judicial proceedings, or those departures by the trial court which the judgment of affirmance sanctioned. We recognize the fact that this Court reviews decisions and not opinions. We suggest, however, that this Court will not permit its power of review to be circumscribed by failure of the opinion to chart its errancies or those of the trial court to which it gave approval by affirmance.

For the foregoing reasons, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully,

WILLIAM P. MACCRACKEN, JR.,
Attorney for Petitioner.

Of Counsel:

URBAN A. LAVERY,
WILLIAM W. BARRON,
FRANK C. STERCK.

APPENDIX.

Partial Statement of Docket Entries in District Court.[1]

PROCEEDINGS.

1949

May 19 Motion of Remington Rand, Inc. for leave to intervene; P & A; app. Homer Cummings, J. Edw. Burroughs, Jr. and Frank C. Sterck; Served 5/19/49 M.C. 5/19/49

June 17 Memo. filed specially by pltff. in opposition to Motion of Remington Rand for leave to Intervene; mailed 6-17-49

17 Deft. memo. in opposition to motion of Remington Rand to intervene; served 5/17

21 Memo. of pltff. in opposition to motion that deposition be not taken etc.; mailed 6/20/49

July 22 Supplemental memo of Remington Rand, Inc., in support of motion to intervene, personally 7/22/49

23 Supplemental memo of defts. in opposition to motion of Remington Rand, Inc. for leave to intervene, served 7/22/49

Oct. 18 Order granting motion of Remington Rand, Inc. for leave to intervene and file a complt. herein. Holtzoff, J. (N)

18 Intervening petition of Remington Rand, Inc. App. of Cummings, Stanley, Truitt & Cross, J. Edward Burroughs, Jr. & Frank C. Sterck. Filed

25 Motion of defts. for order that defts. & pltf. are entitled to settle action regardless of right which intervenor has or asserts to contrary; served 10-24-49; P & A's; M.C. 10-25-49, filed

25 Stipulation of defts. & Remington Rand, Inc. extending time for Remington Rand, Inc. to file its P & A's in opposition to deft's. motion of 10-25-49 to & including 11-5-49. filed

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[1] This Appendix includes only those docket entries which reflect proceedings affecting the intervention proceedings. A certified statement of all docket entries, complete to April 4, 1951, has been filed with the Clerk of this Court.

26 Certified copy of order of U.S.C.A. ordering that the effectiveness of Order of Intervention be stayed to and including 10-25-49. filed

Nov. 4 Memo of intervenor pltf. in opposition to deft's. motion of 10-25-49; exhibits (2). filed

8 Memo of intervenor in opposition to motion of deft's. to dismiss complt.; mailed 11-8-49. filed

Dec. 7 Supplemental memo of deft. in support of motion for an order that pltf. & defts. are entitled to settle action, etc.; per. served 12-6-49. filed

15 Motion of pltf. to dismiss complt. of intervention and/or motion to strike matter therefrom; served 12-14-49; memo in support; M.C. 12-15-49. filed

16 Stipulation between I. G. Chemie & Remington Rand extending time within which intervenor may answer pltf's. motion to dismiss complt. of intervention, etc. to and including Jan. 5, 1950. filed

16 Affidavit of David Schwartz in support of motion of defts. for order adjudging that pltfs. & defts. are entitled to settle action, regardless of right of intervenor; service accepted 12-16-49. filed

21 Official transcript of proceedings (7-25-49) filed

21 Answer of intervenor pltf. to statement of David Schwartz on behalf of deft. filed

21 Order denying motion of defts. for an order adjudging defts. & pltfs. are entitled to settle this action regardless of any rights intervenor has or asserts to the contrary. Pine, J. (N)

27 Stipulation extending time to plead to complt. in intervention to Jan. 16, 1950. (Fiat) Letts, J. (N)

1950

Jan. 3 Notice by pltf. to intervenor of taking oral deposition; service accepted 1-3-50

4 Motion of defts. for reconsideration of deft's motion for declaratory relief; P & A; exhibit; M.C. 1-4-50 filed

5 Memo of intervenor in opposition to motion of pltf. to dismiss complt. of intervention or to strike matter therefrom; mailed 1-4-50

Jan. 9 Reply by pltf. in support of motion to dismiss complt. of intervention, etc.; mailed 1-7-50 filed
9 Answer of plfts. to motion for reconsideration of defts. motion for declaratory relief; mailed 1-9-50.
11 Transcript of proceedings on motion to dismiss intervening petition. filed
13 Notice of intervenor to take oral deposition of pltf; mailed 1-13-50 filed
16 Motion of pltf. to compel intervenor to proceed with deposition & to quash notice of intervenor to take oral deposition; P & A. filed
18 Order denying motion of pltf. to dismiss complt. of intervention and/or motion to strike. Pine, J. (N)
18 Order denying motion of deft. for reconsideration of motion for declaratory relief. Pine, J. (N)
24 Answer of defts. #1 & 2 to complt. for intervention; served 1-24-50 (N)
31 Notice by Remington Rand of taking deposition of F. Rickner; Dr. U. Wehrli & Roy Archibald; mailed 1-31-50.

Feb. 6 Motion of intervenor for permission to take depositions; P&A; affidavit; exhibit; mailed 2-4-50.
7 Hearing on intervening petition of Rem. Rand, vol. 1, pp. 1-139. filed
9 Order permitting suspension of trial for one week to permit taking of deposition. Pine, J.
10 Hearing resumed; testimony; respited until 10:00 A.M. Monday. Pine, J.
17 Telegram from Frank Sterck re: inability to arrive for deposition. filed
27 Hearing resumed; testimony; respited until 10:00 A.M. March 15, 1950. Pine, J. (N)

Mar. 4 Copy of radiogram from Donald Hiss & Frank Sterck to John R. Wood dated 2-28-50. filed
4 Copy of stipulation by Frank Sterck & Donald Hiss dated 3-3-50. filed
13 Acknowledgment by witnesses, U. Wehrli & F. Richner of examining their depositions & find no changes needed; also same statement by Roy Archibald. filed

13 Depositions of R. Archibald, U. Wehrli & F. Richner on behalf of Remington-Rand; cost ($843.50); published & filed
17 Hearing resumed & respited until March 20 at 10:00 A.M. Pine, J.
23 Hearing resumed; testimony; respited until 10:00 A.M. tomorrow Pine, J.

Mar. 23 Hearing resumed; testimony; respited until 10:00 A.M. Monday. Pine, J.
23 Order extending time for filing record on appeal & docketing same. Pine, J.
28 Hearing resumed; arguments; taken under advisement. Pine, J.
31 Memo opinion (Findings of Fact & Conclusions of Law & Judgment to be presented.) Pine, J.

Apr. 4 Transcript of proceedings on intervening petition of Remington Rand Inc., 2-10-50. * * *
14 Motion of Remington Rand, Inc. for leave to file an amended complt; P&A; notice, mailed 4-14-50; exhibit.
17 Amended Complt. for intervention, granted. (Fiat) Pine, J.
26 Suggested Findings in behalf of Intervenor, Remington Rand. filed
26 Answer of Pltf. to amended complt. of Intervention; Serv. 4-17-50. filed.
26 Answer of Dfts. to amended complt. of Intervention; Serv. 4-26-50. filed.
26 Findings of Fact & Conclusions of Law. Pine, J. (N)
26 Judgment dismissing complt. of Intervention of Remington Rand. Pine, J. (N)

June 23 Notice of Appeal by Remington Rand, Intervenor from order of 4-26-50 dismissing complt.; mailed 6-22-50 filed

July 10 Designation of Record on appeal by Intervenor; mailed 7-10-50 filed
15 Counterdesignation of record by Pltf; Serv. 7-14-50. filed.
18 Counterdesignation of record by Dfts. (Appellees); mailed 7-18-50

19 Statement of Points by appellants; mailed 7-19-50 filed.
19 Designation of Record; mailed 7-19-50 filed.
20 Supplemental designation of record filed.
20 Motion of Intervenor pltf. for an order allowing transmittal of original papers & exhibits to Court of Appeals, P/A filed
21 Order directing Clerk of Court to forward to U. S. Court of Appeals the originals of all papers and exhibits listed in paragraphs 6 & 7 of Intervenor pltf's Designation of Record, etc. Tamm, J. (N)
28 Joint counter-designation of Record on appeal; mailed 7-28-50 filed.

Aug. 1 Transcript of Record of Appeal delivered to J. Edward Burroughs filed

1951

Jan. 3 Appearance of William P. MacCracken, Jr.; atty for Intervenor; filed
4 Motion of pltf. for order nunc pro tunc that no reason for delay P&A; mailed 1-3-51 filed
4 Supplemental designation of record of pltff. (Appellee)
4 P & A in opposition to motion for nunc pro tunc order, by intervenor pltff., Wm. P. MacCracken, Jr.; serv. ackn. 1-4-51;
4 Order on motion, nunc pro tunc; Ordered that determination of no just reason for delay be formally entered of record; effective as of April 26, 1950; Pine, J.
23 Mandate of Oct. 30, 1950 dismissing appeal on order of Dec. 21, 1949; filed

IN THE

Supreme Court of the United States

October Term, 1951.

No. 148.

SIDNEY KAYN INC., *Intervenor-Petitioner*,

against

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. etc. (In sequestri), *Plaintiff-Respondent*,

and

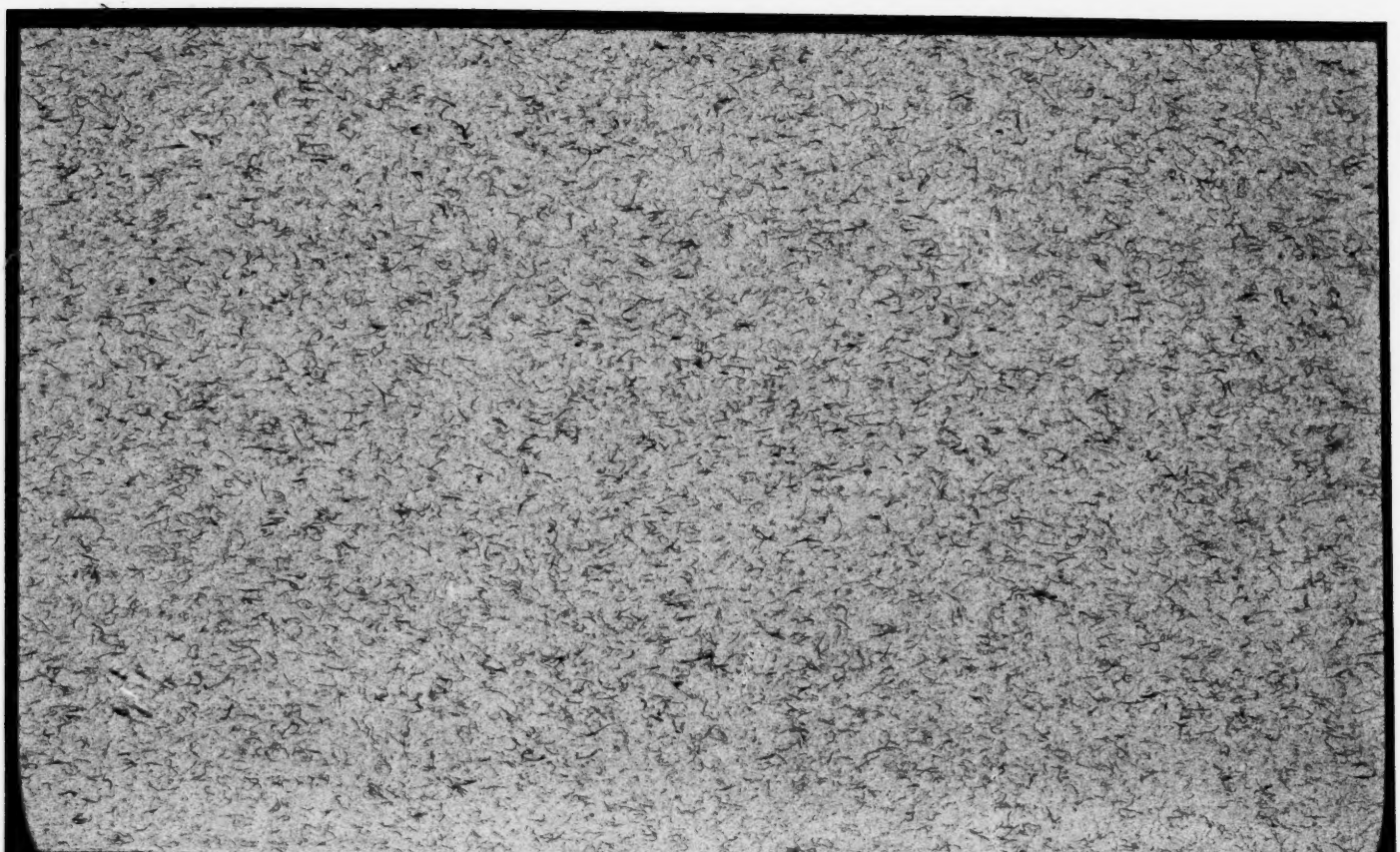
J. HOWARD MCGRATH, Attorney General of the United States as Successor to the Alien Property Custodian, and GEORGE MAURY ORAM, Treasurer of the United States, *Defendants-Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR PLAINTIFF-RESPONDENT, SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. etc. (In sequestri), IN OPPOSITION.

JOHN J. WILSON,
DONALD HISS,
JOHN H. HARRIS,
Attorneys for Plaintiff-Respondent.

Press of Byron S. Adams, Washington, D. C.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 148.

REMINGTON RAND INC., *Intervenor-Petitioner,*

against

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. ETC. (Interhandel), *Plaintiff-Respondent,*

and

J. HOWARD MCGRATH, Attorney General of the United States as Successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, Treasurer of the United States, *Defendants-Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR PLAINTIFF-RESPONDENT, SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. ETC. (Interhandel), IN OPPOSITION.

OPINIONS BELOW

The United States District Court for the District of Columbia wrote a memorandum opinion (R. 26) which is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 400) is at 188 F. 2d 1011.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Whether the District Court abused its discretion in setting down for trial petitioner's complaint of intervention prior to final disposition of the main case involving plaintiff-respondent's claim for the return of property vested by the Alien Property Custodian. (R. 396)

2. Whether there was compliance with Rule 54(b) of the Federal Rules of Civil Procedure. (R. 394-396; 408-410; 413, 414)

3. Whether the Court of Appeals acted properly in concluding that the District Court's ruling excluding the Wehrli memorandum did not constitute error and "certainly none which appeared to be 'inconsistent with substantial justice' ". (R. 400, 402)

STATUTES AND RULES INVOLVED

All statutes and the Federal Rules of Civil Procedure, 28 U.S.C. Sec. 723c et seq., deemed particularly pertinent here are given in the Petition (pp. 3-5) except for the following:

Rule 61 provides:

> **Harmless Error.** No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard

any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 75(h) provides:

> **(h) Power of Court to Correct or Modify Record.** It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule and in Rule 76, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

STATEMENT.

This litigation is limited to the dismissal, after trial on the merits, of petitioner's amended complaint of intervention (R. 5).

The main action instituted on October 21, 1948, by plaintiff-respondent, Societe Internationale Pour Participations Industrielles et Commerciales, S. A. Etc. (Interhandel), a Swiss corporation, hereinafter referred to as Interhandel (Orig. R. 2005), is still pending in the District Court. In the main action Interhandel sued the Attorney General and

the Treasurer of the United States under section 9(a) of the Trading with the Enemy Act, 50 U.S.C.A. App. Sec. 9(a), for the return of certain shares of stock of General Aniline & Film Corporation (GAF) and other assets which had been vested by the Alien Property Custodian in 1942 and 1943 and are now held by the Attorney General as successor to the Custodian. (Orig. R. 2005)

On May 19, 1949, Remington Rand, the petitioner, filed a motion seeking leave to file a complaint of intervention.* On October 18, 1949, the motion was granted and the complaint filed (R. 2). After completion of trial on the merits, this was supplanted by an amended complaint (R. 5).

In the amended complaint Remington Rand asserted contingent rights to the vested GAF shares resulting from an oral declaration** made by Interhandel on June 6, 1946. According to Remington Rand, the terms of the declaration provided that should Remington Rand, before the specified expiration date, submit an offer*** promising to pay $25,000,000 to Interhandel for the vested GAF shares, Interhandel would thereby become firmly obligated to deliver such shares to petitioner if at any time in the future the vested shares and other property were returned to Interhandel and if certain discriminatory treatment by the United States was eliminated. On May 5, 1947, which

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* A partial statement of docket entries in the District Court, including those mentioned here, is contained in the Appendix to the Petition, pp. 23-27.

** The oral declaration was also referred to by other terms. For example, the word "option" was used by two of petitioner's witnesses (R. 134, 137, 144); the District Court referred to it as "an oral statement or offer" (R. 31, 32); the Court of Appeals used the term "declaration" (R. 400, 401). In this brief it will be referred to as a "declaration".

*** Here again different phrases appear in the record to describe Remington Rand's contemplated response to Interhandel's declaration. Petitioner's complaint used the phrase "offer to purchase" (R. 7); the District Court used the same phrase in its Findings (R. 31), and the word "acceptance" in its Conclusions (R. 36); the Court of Appeals used the word "offer" (R. 401). In this brief the word "offer" is used.

was prior to the ultimate date of termination of the declaration, Remington Rand submitted an offer to purchase the vested GAF shares at the stipulated price and maintained that it was willing and able to perform its part of the agreement upon delivery by Interhandel of the shares. Remington Rand then charged that Interhandel refused to recognize its obligations under this agreement and intended to dispose of its rights and interest in the GAF shares in disregard of such agreement. Remington Rand prayed for a judgment declaring it to be entitled to the GAF shares when the conditions were fulfilled and for an injunction restraining Interhandel from disposing of its rights or interest in the shares (R. 5-8).

Interhandel denied the existence of a legally binding agreement. Its answer asserted that the declaration constituted a "gentlemen's agreement" which was not legally enforceable under Swiss law, which controlled. Interhandel alternatively claimed that its June, 1946, declaration provided that an offer of Remington Rand to purchase the GAF shares for $25,000,000 would give rise to a legally binding agreement *only if before* the specified expiration date the shares were returned to Interhandel by the United States authorities, other vested property restored, and the discriminations eliminated. In other words, all of these conditions were conditions precedent in that, unless they were fully satisfied prior to the expiration date, no binding agreement would come into being even though Remington Rand should submit an offer to purchase the shares prior to that date. (R. 8-19, 25). The expiration date originally specified in the declaration was extended several times. Ultimately Interhandel stipulated that the declaration would run indefinitely, subject to cancellation upon Interhandel's giving fifteen days notice. Such notice was given on April 21, 1947. The termination date therefore was fixed at May 6, 1947. The conditions precedent have not been satisfied, as was admitted by petitioner (R. 286).

Accordingly, Remington Rand's alleged offer of May 5, 1947, was ineffectual. (R. 8-19, 25)*

Upon completion of the trial a memorandum opinion was filed by the District Court stating that petitioner, the intervenor there, had "failed to establish, by a preponderance of the evidence, the basic element of its claim, namely, the existence of the agreement between itself and plaintiff [Interhandel] on which it relies and as particularly described in the complaint of intervention and pre-trial statement; and having failed in this regard, it is not entitled to the relief prayed." (R. 26) Thereafter the District Court filed its findings and conclusions. It specifically found that the conditions contained in the declaration of June, 1946, were conditions precedent, i.e., that the GAF shares had to be returned to Interhandel and the other conditions fulfilled before the termination date (R. 31, 32). Interhandel having given fifteen days notice on April 21, 1947, the termination date of May 6, 1947, was thus established. (R. 31, 33) It was conceded by petitioner that the shares had not been returned and that the other conditions had not been satisfied on that date or even at the time of trial (R. 286).

On the basis of these facts, the trial court concluded that, as a matter of law, the offer of Remington Rand became ineffectual on May 6, 1947, the termination date (R. 36).

The District Court also found that Interhandel's declaration was intended to be a "gentleman's agreement" and that under the law of Switzerland it gave rise to no enforceable rights. (R. 31, 35) Being unenforceable under the law of Switzerland, the place where Interhandel's declaration and Remington Rand's offer were made, the

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* Additional independent defenses were advanced by Interhandel, some of which were sustained by the District Court, some rejected. Inasmuch as the Court of Appeals considered it unnecessary to consider these additional defenses in order to affirm the judgment of the lower court, these defenses are not discussed here.

agreement would not be enforced in the District Court (R. 36).*

Judgment was accordingly entered dismissing the complaint of intervention (R. 37, 38). Remington Rand thereupon took appropriate, timely and unequivocal steps to obtain review by the Court of Appeals for the District of Columbia Circuit.** In its brief submitted to the appellate court petitioner contended that the findings of fact below were clearly erroneous and complained of certain evidentiary rulings.

If Remington Rand in its petition had continued to adhere to its position on the merits and had confined itself to the points set forth in its brief filed with the Court of Appeals, we could in this statement now proceed in an orderly manner to examine the disposition of this case on appeal. An examination of other parts of the record not relevant to the merits or the rulings on evidence would be unnecessary. Remington Rand, however, has now abandoned its contention that it should prevail on the merits and in its petition advances two technical points which were not mentioned in its brief.

Petitioner *now* attacks the District Court's order which set the intervention case down for trial separately and without waiting for completion of trial of the main case, notwithstanding petitioner's failure to object at the time the court took such action or to urge reversal on this ground in the appellate court. Petitioner's present position is that the court's discretion under Rule 42(b) of the Federal Rules of Civil Procedure was "misused". (Pet. 2, 9, 10 and 11).

Petitioner's second point is that the Court of Appeals lacked jurisdiction in this case. The determination of no

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* Additional findings and conclusions in support of the contentions of Interhandel are not discussed for reasons set forth in the footnote on page 6, *supra*.

** Notice of appeal was duly filed on June 23, 1950. Transcript of the record on appeal was filed on August 1, 1950. (Pet. 26, 27)

just reason for delay required by Rule 54(b), Remington Rand now asserts, had not been made while the case was pending before the District Court and was not remedied by the *nunc pro tunc* order which the District Court entered on January 4, 1951, after the appeal had been perfected (R. 413, 414).*

A proper understanding of these new issues now raised by Remington Rand requires us at this stage to interrupt a strictly chronological statement of the case and revert to developments in the District Court in connection with pre-trial and post-trial motions as such developments appear in the record.

Prior to the filing of answers to the complaint of intervention, the Attorney General and the Treasurer of the United States moved for an order "adjudging that defendants [the Attorney General and the Treasurer of the United States] and the plaintiff [Interhandel] are entitled to stipulate for the settlement and dismissal with prejudice of the cause of action herein asserted by the plaintiff against defendants regardless of any right which the intervenor-plaintiff has or asserts to the contrary." (R. 393)

The motion was denied on December 21, 1949, and on the same date the intervention case was set down for trial on January 30, 1950. The District Court filed a memorandum opinion explaining its reasons for this action (R. 394). According to the opinion, in support of the Attorney General's motion, it had been asserted that "great damage may be done to this property if an early disposition is not made of this [the intervention] case." (R. 394, 396)

The opinion further points out that, in the course of the argument on the motion, the court had been "told" that the property was "in the nature of being perishable" and

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* It is noted that Remington Rand in attacking the appellate court's jurisdiction is now taking a position diametrically opposed to the position which it maintained as appellant in perfecting the appeal and in urging the Court of Appeals to reverse the District Court.

the court had "got the suggestion" that Remington Rand, the intervenor, had filed "something in the nature of a strike-suit" (R. 394, 396). Thus the Court found itself in what it termed a "dilemma". To grant the motion without trial on the merits of the complaint of intervention would have disregarded the rights of the intervenor, Remington Rand. To deny the motion without further action would have disregarded the desires of the plaintiff (Interhandel), and defendant (the Attorney General), to settle the main case; would have failed to protect the property "from deterioration or loss"; and would have interfered "with the Government's program" (R. 396). This dilemma was heightened by the "suggestion" which had been made to the Court that "the intervenor had filed something in the nature of a strike suit." (R. 396). The Court extricated itself from this dilemma by denying the motion and setting down the case of intervention for trial on January 30, 1950, more than six weeks thereafter; more than eight months after May 19, 1949, when Remington Rand had filed its motion for leave to intervene; more than sixteen months after October 21, 1948, when the complaint was filed in the main case; and nearly three years after May 5, 1947, when petitioner contends its agreement with Interhandel to buy the GAF shares became effective.*

The Attorney General opposed the order and asked for reconsideration of his motion for declaratory relief (R. 396). Petitioner remained silent then but now, in its petition, asserts for the first time that the lower court erred in setting the intervention case down for separate and early trial. (Pet. 2, 9, 10, 11). In denying the motion for reconsideration the Court again explained its reasons for ordering a separate and early trial of the intervention litigation in the following manner:

> "I should like to file a written opinion if there were ample time to do so, but in my effort to protect the

* Yet petitioner now claims in its statement that it "was allowed scant time to prepare for" the trial. (Pet. 6).

rights of the plaintiff and the defendants and also safeguard the rights of the intervenor I have set this case down for trial, on January 30.'"*

With respect to the jurisdictional issue, now being raised by petitioner (Pet. 2, 3, 11, 12, 17-22), developments connected with a post-trial motion are relevant. On January 4, 1951, a motion was filed with the District Court by Interhandel seeking the entry of a *nunc pro tunc* order. To be sure, the appeal had been perfected by that time but the record is equally clear that prior to that date there was no indication that any party was uncertain as to the finality of the judgment dismissing the complaint of intervention.** The purpose of such a proposed order was fully explained in Interhandel's points and authorities in support of its motion (R. 409-410). In December, 1950, the Court of Appeals had decided *David* v. *District of Columbia,* 187 F. 2d 204. In that case the court, *sua sponte,* raised the issue of Rule 54(b), and dismissed the appeal for failure to comply with the rule. The opinion indicated that, in an appeal involving Rule 54(b) the lower court should have made a formal determination of record in the exact words of the rule "that there is no just reason for delay."

In the instant case the District Court had affirmatively determined that there were reasons for advancing the case for trial and for determining with finality petitioner's rights of intervention before proceeding with the trial of the main case. This is made clear in the District Court's memorandum opinion denying the Attorney General's motion for declaratory judgment entitling Interhandel and

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* This quotation from Judge Pine's oral opinion denying the motion for reconsideration is found in the points and authorities in support of Interhandel's motion for an order *nunc pro tunc.* (R. 409, 410)

** Petitioner, without any reference to the record, or further documentation, now cavalierly asserts that it was uncertain as to the finality of the judgment and its right to appeal (Pet. 20).

the Attorney General to carry out their desires to settle the main case regardless of petitioner's interests and setting January 30, 1950, as the trial date for the intervention case (R. 394-396). This point was reiterated in the subsequent oral opinion of the District Court denying the Attorney General's motion for reconsideration. (R. 409, 410) But the negative words of the rule—"there is no just reason for delay"—had not been made a matter of formal record. To eliminate all possible doubts and to make doubly sure that Remington Rand's appeal would be decided on the merits and not on a technicality, Interhandel, even though appellee, filed its motion with the District Court seeking a *nunc pro tunc* order which would use the exact negative words contained in Rule 54(b).

Although petitioner was the appellant in the Court of Appeals, it opposed Interhandel's motion (R. 411, 412). However, the motion was granted and an order entered, effective April 26, 1950, in which Judge Pine observed that he had "expressly determined prior to and at the time of the entry of final judgment herein that there was no just reason for delay . . ." He then "ordered that this determination of no just reason for delay be hereby formally entered of record, effective as of the 26th day of April 1950." (R. 413, 414)

On January 15, 1950, the appeal was argued before the Court of Appeals (R. 399). The question of jurisdiction involving Rule 54(b) was raised at the outset by the Court, (R. 399) and argued at length. Interhandel maintained that the Rule had been satisfied by the determinations of the lower court at the time the case was set for trial and at other times in the course of the trial. Interhandel further asserted that all doubts on this score were eliminated by the *nunc pro tunc* order (R. 413, 414). Petitioner took a contrary position, asserting that the rule had not been complied with, and continued to attack the validity of the *nunc pro tunc* order.

Argument was then heard on the assertions of Remington Rand that the lower court's findings of fact were clear-

ly erroneous and that it had erred in certain evidentiary rulings.

Thus petitioner before the Court of Appeals in January, 1950, maintained completely inconsistent positions. At the start of the argument the Court was told by petitioner that it lacked jurisdiction and was asked to disregard petitioner's brief and to rule that the appeal was premature until the litigation in the main case had been completed. In the next breath the Court was told by petitioner that it had jurisdiction and was asked to adopt petitioner's brief and to reverse the District Court on the merits.

On March 29, 1951, the Court of Appeals rendered a unanimous decision affirming the lower court (R. 400). It was noted that Rule 54(b) had been fully satisfied and the court did not consider any further discussion of the matter necessary. (R. 400)

On the two "fundamental" or "vital" issues of fact, whether the arrangement between the parties was a "gentlemen's agreement" and, alternatively, whether the conditions were conditions precedent it was concluded that the findings below were not clearly erroneous and therefore could not be set aside. Moreover, the opinion went further and added the following:

> "On the contrary, in our opinion the findings of the trial judge are abundantly supported by substantial evidence and should not be set aside." (R. 400, 402)

With respect to Remington Rand's complaint as to certain rulings concerning the admission and exclusion of evidence, including the exclusion of the Wehrli memorandum, the Court of Appeals said:

> "These we have considered and find no error—certainly none which appear to be 'inconsistent with substantial justice.' Fed. R. Civ. P., 61." (R. 400, 402).

The judgment of the District Court was therefore affirmed.

Two courts having rejected its claim on the merits, petitioner, recognizing it has no substantive case, now aban-

dons this avenue and relies on (1) Rule 54(b), (2) a wholly new procedural point, and (3) an evidentiary point. Notwithstanding Remington Rand's record in this case, petitioner takes sharp issue with the suggestion made to the trial court that "the intervenor [petitioner here] had filed something in the nature of a strike suit." (R. 396) This suggestion is characterized by petitioner as "a gratuitous slander entirely unsupported by the record." (Pet. 10) In the light of the record, the strike suit suggestion appears now to be an understatement.

ARGUMENT.

I.

Separate Trial.

Petitioner attacks the action of the District Court in ordering a separate trial of the intervention complaint without waiting for the completion of the trial of the main case. This is given as one of three reasons for granting certiorari, petitioner now contending that in taking such action Rule 42(b) "was misused" by the District Court (Pet. 10).

Petitioner failed to object at the time the lower court ordered a separate trial and failed to urge the Court of Appeals to reverse on this ground. Hence petitioner is not entitled to raise the point for the first time at this stage of the proceedings. *Frazier* v. *United States,* 335 U. S. 497, 514; *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378, 380; *Tyrrell* v. *District of Columbia,* 243 U. S. 1, 5-6.

Even if petitioner had saved its rights by timely exception, there is no merit to the point now being advanced by petitioner. There is agreement in the circuit courts that review by the intermediate courts of an order allowing separate trial is permissible only if there was an abuse of discretion.* Cases cited by petitioner are not in conflict.

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* *Shippers Pre-Cooling Service* v. *Marks,* 181 F. 2d 510, cert. denied 340 U. S. 816 (5th Cir. 1950); *Collins* v. *Metro Goldwyn Pictures Corp.,* 106 F. 2d 83, 87 (2d Cir. 1939).

The exercise of discretion by a trial court is governed by the facts. Being governed by the facts a trial court's exercise of discretion, when affirmed on appeal, is not of sufficient importance for review by this Court, absent an obvious and exceptional showing of abuse. *Graver Manufacturing Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275. Here a mere reading of the complaints which are summarized in the statement at pages 3-5, *supra,* establishes the wisdom of the District Court in ordering a separate trial.

Interhandel's complaint in the main case and Remington Rand's complaint in the intervention case involve definitely diverse claims.* The former concerns the right of Interhandel to the return of the GAF shares which the APC vested as being enemy-owned; the latter concerned Remington Rand's alleged private contract rights with Interhandel.**

Moreover, the record shows that there were additional reasons which motivated the lower court. The Attorney General wanted to be free to settle the main case with Interhandel and thereby protect the property "from deterioration" and further the "Government's program."***

A settlement between the parties in the main case would avoid the expense of a costly and time-consuming trial and thus further the convenience of the Attorney General, Interhandel and the Courts. Remington Rand's complaint, however, prevented such a settlement. If its claim was sound a settlement without its approval would have jeopardized its legitimate interests, as the lower court pointed out (R. 394, 395, 396). If the complaint was lacking in merit, as was found to be the case, then the intervention litigation was "in the nature of a strike suit" (R. 394, 396).

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* This alone is sufficient to justify separate trials. See 3 Moore, *Federal Practice* 3051 (1938 ed.).

** The main case is still in the deposition and discovery stage before a special master.

*** See Attorney General's motion for declaratory judgment (R. 393), his motion for reconsideration (R. 396, 397). See also Judge Pine's memorandum opinion (R. 394, 396).

Under these circumstances, separate trials were inevitable and one complaint had to be tried in advance of the other. With the parties in the main case desirous of terminating the litigation by settlement, the only reasonable solution was to order early trial of the intervention complaint which involved relatively simple issues of fact.

Thus it is seen that there is no possible foundation for charging abuse of discretion.

II.

Rule 54(b).

Petitioner contends that a determination of "no just reason for delay" was not made before the entry of judgment, with the result that under Rule 54(b) the judgment was not final and the appeal premature (Pet. 2, 3, 11, 12, 17-22).*

On January 4, 1951, when the appeal was pending, the District Court entered a *nunc pro tunc* order, effective April 26, 1951, the date the judgment was entered (R. 413, 414). The order was in response to Interhandel's motion (R. 408) filed after the Court of Appeals' decision in *David* v. *District of Columbia*, 187 F. 2d 204 (D. C. Cir., Dec. 14, 1950). In that case the Court, on its own motion, dismissed the appeal because the record failed to show that the lower court had made a determination of no just reason for delay. The language of the opinion made it "conceivable that Rule 54(b) could be deemed applicable" to the instant case so as to result in the appeal being dismissed on a procedural point and not disposed of on the merits. (R. 409, 410) This would have run counter to the trial court's wishes for an early and final adjudication of the merits of petitioner's complaint. (R. 394-396)

At the start of argument on appeal, the court raised the

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* Petitioner also maintains that a further question is presented—whether a judgment in an intervention case is final without regard to Rule 54(b). Such a question is not raised in the instant case. Hence, subdivision III of petitioner's argument (Pet. 17-21) is irrelevant.

issue of Rule 54(b) (R. 399) and "devoted one solid hour to hearing argument on the question of its jurisdiction" (Pet. 20). In its opinion the court said:

> "Entry of the judgment was directed upon an express determination by the court that there was no just reason for delay [Fed. R. Civ. P., 54(b)]." (R. 400)

Under Rule 75(h) the District Court, without leave of the appellate court, had authority to enter the *nunc pro tunc* order. The order recites that the trial court had "expressly determined prior to and at the time of the entry of final judgment herein that there was no just reason for delay" and such determination was thereby "formally entered of record" (R. 413, 414). The record abundantly supports this recital of the lower court.*

The action of the District Court might therefore be interpreted as merely correcting an omission of the record which such a court may do, "either before or after the record is transmitted to the appellate court", under Rule 75(h), "on a proper suggestion or of its own initiative." The appellate court in approving the *nunc pro tunc* order, moreover, could be viewed as giving its "leave" to the District Court, in the form of ratification, to the correction of a clerical omission. [See Rule 60(a)]

The Court of Appeals did not specify whether it relied on one or both of the rules available.

In any event, there is no conflict in the decisions dealing with the propriety of using a *nunc pro tunc* order in this manner. The question has arisen in only one other circuit. *Kaufman & Ruderman* v. *Cohn & Rosenberger,* 177 F. 2d 849 (2nd Cir. 1949). In both circuits the use of a *nunc pro tunc* order to satisfy Rule 54(b) was sanctioned.

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* In denying the Attorney General's motions and in setting January 30, 1950 as the trial date, the Court made it clear that an early and final determination of petitioner's rights of intervention was essential "to protect the rights of the plaintiff and the defendants, and also safeguard the rights of the intervenor." (R. 394, 396, 398; 409)

In the *Kaufman* case an order, entered while the case was pending on appeal and after argument, was held to be proper; in the present case, an order, entered while the case was pending on appeal but before argument, was held to be proper. Thus in the holdings and in principle the cases are in agreement.

Unlike the *David* case cited by petitioner, the Court of Appeals, in the case at bar, was fully appraised of the trial judge's attitude toward the appealability of his judgment and there was no necessity to remand in order to ascertain such attitude.*

Furthermore, the course followed here was eminently sound. No useful purpose would be served by disapproving the *nunc pro tunc* order and dismissing the appeal. The District Court would have to hear a repetition of argument and repeat its action in entering another order determining no just reason for delay. The Court of Appeals would have to hear a repetition of argument and repeat its action in filing another opinion dismissing the case on the merits. Such a course would merely delay a final determination of the rights of the petitioner as intervenor below. Such delay would be detrimental to the interests of the Attorney General and Interhandel, without protecting the legitimate rights of the petitioner, and would unduly burden the lower courts.

III.

Evidentiary Ruling.

Petitioner maintains that the exclusion of the Wehrli memorandum conflicts with decisions of other circuits, and that the document should have been admitted either under the shop book rule, 28 U.S.C. Sec. 1732, or under the rule of past recollection recorded (Pet. 3, 12-17).

Even if petitioner's position on this point is sound, it is

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* Use of a *nunc pro tunc* order in order to comply with Rule 54(b) was examined again by the Court of Appeals for the District of Columbia Circuit and its approval reiterated. *Vale* v. *Bennett*, 15 F. Rules Serv. 54.b.4, Case 6, decided June 7, 1951, D. C. Cir.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 148

REMINGTON RAND INC., PETITIONER

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A. ETC. (I.G. CHEMIE) (INTERHANDEL)

and

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND GEORGIA NEESE CLARK, TREASURER OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND GEORGIA NEESE CLARK, TREASURER OF THE UNITED STATES, IN OPPOSITION

OPINIONS BELOW

The United States District Court for the District of Columbia wrote a memorandum opinion

(R. 26) which is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 400) is reported at 188 F. 2d 1011.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on March 29, 1951 (R. 403). The petition for a writ of certiorari was filed on June 26, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a judgment was final and appealable which dismissed a complaint of intervention on the merits after trial and did not dispose of the principal case between plaintiff and defendants, where the trial judge expressly directed that the judgment be entered and where the judge's express determination that there was no just reason for delay, pursuant to F.R.C.P. Rule 54(b), was made at the time of the entry of judgment but was entered of record by a *nunc pro tunc* order signed while the appeal was pending, an action which was in effect later ratified by the Court of Appeals.

2. Whether review may be sought in this Court of an order of the district court which required a separate and early trial of the issues raised by a complaint of intervention, where no objection was made in the district court and where the question was not raised in the court of appeals; and, if so, was it within the discretion of the district judge *sua sponte* to require a separate and early trial

of such issues in order to protect the subject matter of the suit from deterioration or loss and to protect the rights of all the parties.

3. Whether the two courts below erred in finding the facts concerning petitioner's alleged option to buy the General Aniline & Film stock.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The following Federal Rules of Civil Procedure are involved (28 U.S.C., following § 723c, as amended, 28 U.S.C., 1946 ed., Supp. IV, following § 2072):

Rule 40:

> Assignment of Cases for Trial. The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

Rule 42(b):

> (b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Rule 54(b):

> (b) Judgment Upon Multiple Claims. When more than one claim for relief is pre-

sented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

Rule 60(a):

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Rule 75(h):

(h) Power of Court to Correct or Modify Record. * * * If anything material to either party is omitted from the record on appeal by

error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals.

STATEMENT

The principal action out of which this proceeding arises was brought by Societe Internationale, etc. (I. G. Chemie), pursuant to Section 9(a) of the Trading with the Enemy Act (40 Stat. 411, 419, as amended, 50 U.S.C. App. § 9(a)). The complaint against the Attorney General [1] and the Treasurer of the United States, filed in October 1948, seeks the return, *inter alia*, of some 90% of the stock of General Aniline & Film Corporation (GAF) which had been vested by the Custodian as enemy property (R. 5-6).

On October 18, 1949, by leave of court, petitioner Remington Rand Inc. filed a complaint of intervention alleging that in 1947 it had acquired an option from I. G. Chemie to purchase on certain terms

[1] By Executive Order No. 9788 (October 15, 1946, 11 F.R. 11981) the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief, the term "Custodian" will be used to refer either to the Alien Property Custodian or to the Attorney General, as his successor, and the Treasurer of the United States.

and conditions the vested GAF stock if and when I. G. Chemie prevailed in its suit against the Custodian for return of the stock (R. 2-5). Petitioner filed an amended complaint of intervention on April 17, 1950 (R. 5-8). The prayer was for a judgment declaring that petitioner was entitled to purchase the GAF stock under the terms and conditions of its alleged option agreement and that plaintiff I. G. Chemie be restrained and enjoined from disposing of any interest in said stock (R. 7).

On October 25, 1949, the Custodian moved for a declaratory judgment that defendants and plaintiff were entitled to settle the action regardless of any right which the intervenor had or asserted to the contrary (R. 393). The motion was denied on December 21, 1949 (R. 394). At the same time, the trial judge *sua sponte* and without objection set down for early determination the issues of fact and law raised by the complaint of intervention, with the stated purpose of protecting the subject matter of the action from deterioration or loss and protecting the rights of all the parties (R. 395-396, 409-410). After extended trial on those issues, the court found, *inter alia,* that no option contract existed and thus that the complaint of intervention was groundless on the merits (R. 30-37). A judgment dismissing the complaint of intervention was accordingly entered on April 26, 1950, upon the direction of the trial judge (R. 37-38). Notice of appeal was filed by petitioner on June 23, 1950. Upon

motion of I. G. Chemie (R. 408), the district court, by a *nunc pro tunc* order signed on January 4, 1951 (while the appeal to the court of appeals was pending but before it had been argued), ordered that its determination under F.R.C.P. Rule 54(b) that there was no just reason for delay, made prior to April 26, 1950, the time of the entry of the judgment, be formally entered of record as of that time (R. 413-414). The Court of Appeals for the District of Columbia Circuit (Circuit Judges Proctor, Edgerton and Fahy) affirmed the district court, holding, *inter alia,* (1) that the judgment of the district court was a final one and that the entry of the judgment was directed upon an express determination that there was no just reason for delay, and (2) that the findings of the trial court were abundantly supported by substantial evidence (R. 400-402).

ARGUMENT

1. In this case, the district court supplied a clerical omission in its record after the appeal was taken, by inserting into its judgment, *nunc pro tunc,* its earlier determination that there was no just reason for delay, in compliance with F.R.C.P. Rule 54(b) (*supra,* pp. 3-4). That the omission was clerical is not contested, and could not be, for the court, prior to the trial of petitioner's complaint in intervention, had expressed its views as to the desirability of expeditious disposition of petitioner's claim (R. 395-396, 409-410).

Petitioner's primary contention here (Pet. 12, 17-22) is that the district court was required to have leave of the court of appeals before it could make such a corrective order.[2]

The district court did not, in its order, specify the Rules authorizing its action. Two Rules, however, contain authority. Rule 60(a) (*supra*, p. 4) authorizes the district court to correct clerical omissions or mistakes in its judgment, and Rule 75(h) (*supra*, pp. 4-5) generally authorizes correction of the record on appeal. The two Rules differ somewhat in that the former requires leave of the appellate court, once the appeal has been docketed, and the latter does not. Both Rules contemplate what took place here—the filling in of material omitted or misstated by oversight. It is thus doubtful whether explicit leave of the court of appeals was required. If leave was required, however, it was tacitly granted by the decision of the court of appeals to hear and consider the appeal on the basis of the *nunc pro tunc* correction. Cf. *Vale* v. *Bonnett*, 15 Fed. Rules Serv. 54b.4, case 6, decided June 7, 1951 (C.A.D.C.).

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[2] Inasmuch as the district court expressly directed the entry of the judgment and expressly determined that there was no just reason for delay, this case does not present the question whether, in the absence of such direction and determination, the dismissal of a third-party claim by the district court is final and appealable. All the courts of appeal which have passed upon the question have answered it in the negative. *David* v. *District of Columbia*, 187 F. 2d 204 (C.A.D.C.); *Flegenheimer* v. *Manitoba Sugar Co., Ltd.*, 182 F. 2d 742 (C.A. 2); *Kam Koon Wan* v. *E. E. Black, Limited*, 182 F. 2d 146 (C.A. 9).

The court below opened its opinion by writing that "This appeal is from a final judgment * * *. Entry of the judgment was directed upon an express determination by the court that there was no just reason for delay" (R. 400). It was thus approving the validity of the entry as a means of perfecting the district court's judgment. The court has since stated, in another opinion on the same problem, that in considering the appeal in the instant case it "obviously held that Rule 54(b) had been sufficiently complied with." *Vale* v. *Bonnett, supra.*

The petitioner's contention reduces itself to frequent repetition of a charge that the court of appeals "assumed" that the judgment below was final and that the *nunc pro tunc* order was proper (Pet. 12, 19, 20, 21). The charge is wholly unfounded and is refuted by petitioner's admission that the question of the jurisdiction of the court of appeals was argued for "one solid hour" (Pet. 20, R. 399). Since petitioner attempts to go into the subjective question of the consideration given to this matter by the court of appeals, we recount for the benefit of this Court the circumstances of the oral hearing on this question. The question was not treated in any of the briefs below. It was only while the appeal was pending and after briefs had been filed that the decision in *David* v. *District of Columbia,* 187 F. 2d 204 (C.A.D.C.), called to the attention of the bar the problem of the determination required by Rule 54(b). On the opening of

oral argument, the court of appeals raised the question in this case, and all counsel, in turn, argued and discussed the matter, before the court went on to the argument on the merits. The argument as to Rule 54(b) was participated in by all the members of the bench with much interchange of remarks between the court and counsel, and ranged over many facets of the question. Frequent reference was made by the court and counsel to *Kaufman & Ruderman* v. *Cohn & Rosenberger,* 177 F. 2d 849 (C.A. 2). There the Court of Appeals for the Second Circuit decided an appeal on the merits and then stayed its hand for ten days in order to give the district court the opportunity to enter a *nunc pro tunc* express determination in compliance with Rule 54(b). That case was, of course, an instance of the grant of leave by the appellate court for the perfection of the judgment below, while the appeal was pending. In urging that case upon the court below in a case where the *nunc pro tunc* order had already been entered, counsel for I. G. Chemie and the Custodian were in effect asking that the court grant whatever leave was required. The decision, as we have shown above, was in favor of leave, after full argument was had.

Petitioner's position, stated without elaboration (Pet. 21-22), is apparently that the court of appeals had no alternative but to remand the case to the district court so that the correction might be made. The courts are not bound, either by reason or precedent, to take such meaningless steps. *Vale*

v. *Bonnett,* 15 Fed. Rules Serv. 54b.4, case 6, decided June 7, 1951 (C.A.D.C.). Cf. *Kaufman & Ruderman* v. *Cohn & Rosenberger,* 177 F. 2d 849, 850 (C.A. 2); *Crosby* v. *Pacific S.S. Lines, Ltd.,* 133 F. 2d 470 (C.A. 9), certiorari denied, 319 U.S. 752.

2. Another of petitioner's contentions (Pet. 9-11) is that the court below erred in that it approved the order of the trial judge for a separate and early trial of the issues raised by the complaint of intervention. Petitioner asserts that the order for a separate trial was improvident. We submit that since the order was not objected to in the district court and was not questioned in the court below, this point is not deserving of hearing by this Court. *Frazier* v. *United States,* 335 U.S. 497, 514; *Helvering* v. *Minnesota Tea Co.,* 296 U.S. 378, 380; *Tyrrell* v. *District of Columbia,* 243 U.S. 1, 5-6. In any event, it was clearly within the discretion of the trial court, under Rules 40 and 42(b) (*supra,* p. 3), to order a separate and early trial of the intervenor's claim. *Shippers Pre-Cooling Service* v. *Macks,* 181 F. 2d 510 (C.A. 5), certiorari denied, 340 U.S. 816. The court acted in its discretion in order to protect the property from deterioration or loss and to do the least possible injury to the conflicting interests of the three parties before it (R. 395-396, 409-410). This is especially so since the issues raised by the complaint of intervention involved a contract alleged to have been made by Remington Rand Inc. and I. G. Chemie in

1947, an issue distinct and conveniently separable from the issues of enemy taint and cloaking raised by the principal suit for the return of property vested under the Trading with the Enemy Act. Such situations warrant separate trials. *Collins* v. *Metro-Goldwyn Pictures Corporation,* 106 F. 2d 83, 87 (C.A. 2) (concurring opinion, Clark, C. J.); *Container Co.* v. *Carpenter Container Corp.,* 9 F.R.D. 89 (D. Del.); *Society of European Stage Authors and Composers, Inc.* v. *WCAU Broadcasting Co.,* 35 F. Supp. 460 (E.D. Pa.).

Petitioner sought to intervene in a suit for the return of vested property, claiming dealings with the plaintiff by which it allegedly got an interest in the vested property. It can hardly complain that its allegations were promptly put to trial.

3. Petitioner raises (Pet. 2-3), but does not argue, the question whether the trial court's findings as to the alleged option to purchase were clearly erroneous. The court of appeals held that these findings "are abundantly supported by substantial evidence" (R. 402), and under the established rule such concurrent findings of fact will not be reviewed here. *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 213-214. Accordingly, it has now been authoritatively determined that petitioner has no right to intervene and is not entitled to the injunctive relief it demands.

CONCLUSION

The decision below is correct; there is no conflict of decision. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
HAROLD I. BAYNTON,
Assistant Attorney General.
JAMES D. HILL,
GEORGE B. SEARLS,
DAVID SCHWARTZ,
ANTHONY W. GROSS,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 148

REMINGTON RAND INC., *Intervenor-Petitioner,*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. ETC. (Interhandel), *Plaintiff-Respondent,*

and

J. HOWARD MCGRATH, Attorney General of the United States as Successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, Treasurer of the United States, *Defendants-Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY BRIEF OF REMINGTON RAND INC., PETITIONER.

WILLIAM P. MACCRACKEN, JR.,
Attorney for Petitioner.

Of Counsel,
URBAN A. LAVERY,
WILLIAM W. BARRON,
FRANK C. STERCK.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY BRIEF OF REMINGTON RAND INC., PETITIONER.

I. THREE MISLEADING ASSERTIONS.

Petitioner desires to correct three misleading assertions by respondent, Interhandel, in the statement included in its brief in opposition.

A. It is said at page 7 that "Remington Rand, however, has now abandoned its contention that it should prevail on the merits * * *."

This is not true.

Rule 38 of this Court limits the scope of a petition for certiorari. A brief on the merits has no place in the petition. The questions upon which we invoke the writ require no discussion of the merits. But our petition makes it clear that the errors and departures of the two courts below rendered impossible a just determination on the merits. Petitioner has never wavered in its position that it is entitled to the shares of GAF stock, should Interhandel be entitled to their return. We would not be here if Remington Rand had "abandoned its contention that it should prevail on the merits". Our opposition has made an irresponsible statement.

B. At page 12 of its statement, Interhandel asserts that petitioner assumed two completely inconsistent positions by arguing for a reversal on the merits and at the same time pointing out that the court below was without jurisdiction. There is no inconsistency. True, petitioner contended for a reversal and still contends that the judgment was wrong on the merits. Is it ever wrong or improper for counsel to point out to a court its lack of jurisdiction? Would we not have been derelict in duty by concealing our honest belief that the court below had no power to entertain the appeal and that the district court had no power to enter its *nunc pro tunc* order in an effort to shore up the faulty basis of appellate jurisdiction? By thus pointing out the want of jurisdiction, were we precluded from arguing that the judgment was wrong on the merits? If so, then indeed as Emerson said, "a foolish consistency is the hobgoblin of little minds".

This Court, in *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6, held that estoppel cannot operate to confer jurisdiction. There, the defendant, who removed a case from state to federal court, appealed from an adverse judgment and challenged the jurisdiction of the federal district court. This Court sustained the objection and held that defendant was not estopped from objecting to want of jurisdiction.

C. Interhandel's statement, also at page 12, says that in the decision of the Court of Appeals, 188 F. 2d 1011, "It was noted that Rule 54(b) had been fully satisfied and the court did not consider any further discussion of the matter necessary. (R. 400)". We find no such statement in the record. The court's only reference to Rule 54(b) is quoted in our petition at page 8 and demonstrated to be completely inaccurate. (P. 11-12).

Counsel perhaps infers, and would have this Court infer, that the court below considered that Rule 54(b) had been fully satisfied and considered further discussion unnecessary. The court below said nothing of the kind. One can only speculate upon what was in its mind when it brushed off the question of jurisdiction without any discussion after an hour of argument had been devoted to that question alone, prior to the argument on the merits. (R. 399). Interhandel's statement obviously is inferential rather than factual.

II. THE FACTUAL ISSUES SUMMARIZED.

Ordinarily the factual issues are not argued in a petition for certiorari. Therefore our petition stated only the facts necessary to an understanding of the questions. However, Interhandel's opposing brief devotes ten pages to a biased and slanted presentation of the factual issues which should not go unchallenged. (Br. 3-13). Not only for that reason but also because of the special and unusual nature of the case itself, as well as its public importance the following summarized statement is here set out:

> 1. Shortly after the outbreak of World War II, the Alien Property Custodian seized and later vested 445,624 shares of the Common A stock and 2,050,000 of the Common B stock of GAF (R. 9), which stock had been previously owned by Interhandel. That stock is the subject matter of the present litigation between RemRand and Interhandel. It is also the subject of the basic suit of Interhandel to recover the stock for itself. The RemRand intervention has not delayed that

litigation. The question whether GAF is to be foreign owned or American owned is involved in this litigation. RemRand is American owned and if its position is sustained, GAF is certain to become American owned.

2. Interhandel is a Swiss corporation of dominantly foreign ownership. Both GAF and RemRand are large American industrial corporations, organized under the laws of Delaware.

3. The present day value of this GAF stock is admitted to be from $60,000,000 to $100,000,000.[1] There is no testimony as to the corresponding value of the seized property at the time of seizure, but presumably it was very much less than the figures above indicated. In June, 1946, Interhandel was not only willing but anxious to make a contract to sell the seized GAF stock to RemRand for a price of $25,000,000, payable in Switzerland, said contract to be performed upon the return of the stock to Interhandel.[2]

This GAF property, therefore, has more than doubled in value since 1946.[3]

4. Interhandel has consistently claimed (and claims in its basic suit against the Government to recover this GAF stock) that there was no just or legal ground for the seizure of its property. The Government is

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[1] See testimony to that effect February 19, 1951, by the Attorney General before a House Committee, printed in "Hearings" 82nd Cong., 1st Sess., "*Department of Justice Appropriations for 1952*", p. 12.

[2] See the frank admissions to this effect by Interhandel's President and General Manager respectively (R. p. 257 and R. p. 221). The National Association of Securities Dealers Quotation Service shows that GAF Common A stock (the only on the market) reached a high of 110 in 1951; whereas that stock sold in December, 1941, just prior to seizure at 44.

[3] This point of doubling in value is obviously pertinent here because the Government's brief (p. 11) attempts to justify the action of the trial court in splitting off the RemRand proceedings and ordering them to trial in advance of the main suit by saying:

> "The Court acted in its discretion in order to protect the property from deterioration or loss * * *."

That charge of "deterioration" which the Government made to the trial court (R. 396) was entirely groundless.

now engaged in long and protracted litigation with Interhandel over that issue. Interhandel's suit to recover its stock was started in October, 1948, and at the present time—three years later—that litigation may last for several years.[4]

5. It is conceded on this Record, both by the Government and by Interhandel, that the American Government is determined that the control of this important industrial concern of GAF will never be permitted to return to foreign ownership. At the same time the United States Government has definitely announced its determination to get out of this GAF business and return it to private ownership as soon as may reasonably be done.[5]

6. RemRand is a leading American industrial concern, with world-wide interests, whose particular field of production would be favorably supplemented and augmented by the acquisition of the GAF plants and processes—particularly in the photographic field. It was for these reasons that RemRand after the end of World War II, began its negotiations with Interhandel, in Switzerland, looking toward the eventual purchase of this GAF stock. After many months of protracted negotiation, carried on with the knowledge and implicit approval of the United States Government, RemRand and Interhandel reached a meeting of the minds as to

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[4] This point, about the long protracted litigation between Interhandel and the Government is pertinent here in view of the Argument in the Government's brief (p. 6) about the Government's desire "to settle" with Interhandel. That suggested "settlement" between Interhandel and the Government was in fact in no way hampered or obstructed by RemRand's intervention suit. But that proposed "settlement" seems now further away than ever. Indeed the Attorney General in his testimony before Congress in February, 1951, above cited, admitted this point by saying: "Unless we get some Congressional help in the matter this litigation will be carried on for years."

[5] For admissions by Interhandel that the GAF stock would never be permitted to be returned to foreign ownership, see Interhandel's Minutes for May, 1946 (R. 334 to 337). For repeated statements by the Attorney General of the Governments's desire to get out of this GAF business "as soon as it can" and to put that Company "back into private hands", see the testimony of the Attorney General February, 1951, *supra*, Note 1.

such proposed purchase on an if-as-and-when basis. In June, 1946, Interhandel made a formal, oral "Declaration of Readiness" to RemRand for such proposed purchase at an overall price of $25,000,000 to be paid in Switzerland if and when the GAF stock would be released from seizure and could be delivered under the contract. The specific terms of that oral Swiss offer were set out, at the time, in writing in the Minutes of Interhandel at its meeting in May, 1946, and constitute a crucial part of the documentary evidence in the present litigation. (R. 336-37).[6]

7. The final date for acceptance by RemRand of the Swiss offer was originally fixed by Interhandel as June 30, 1946. However, that final acceptance date was extended by Interhandel from time to time until May 6, 1947. (R. 358).

8. Following the Swiss offer of June, 1946, to sell its GAF holdings to RemRand, and down to about the middle of April, 1947, both RemRand and Interhandel fully cooperated in efforts to have the Alien Property Office release the vested GAF stock and accede to the proposed sale of that stock from Interhandel to RemRand.

9. On May 5, 1947, and before the expiration date of the Swiss offer, RemRand accepted that offer by two written cablegrams sent to Interhandel.[7]

10. For some unexplained reason, Interhandel waited twelve days after the receipt of the RemRand acceptance, and then on May 17, 1947, replied to RemRand by cablegram and letter in an effort not only to reject RemRand's acceptance, but also to repudiate completely its offer to RemRand.[8]

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[6] It should be stated that the overall price of $35,000,000 indicated in those Minutes of May, 1946, was adjusted in June, 1946, so that the "cash sum" to be paid by RemRand was reduced to $25,000,000.

[7] The terms of the two cablegrams from RemRand to Interhandel are set out by admission in the answer of Interhandel (R. 11-13) to RemRand's intervention complaint.

[8] The Swiss repudiation of its June, 1946, offer to RemRand, as well as its rejection of RemRand's attempted acceptance of that offer, are set out and admitted in Interhandel's Answer. (R. 11-13).

11. The evidence at the trial clearly indicated that the Alien Property Office (through the Department of Justice) was the actual instigator of Interhandel's Notice of Termination of its offer to RemRand. The reason was that the Alien Property Office in April, 1947, had itself begun "direct negotiations" with Interhandel looking toward a "settlement" of the claims of the Swiss concern for the return of its seized property.[9]

12. In October, 1948, RemRand, after leave of court duly had, filed its intervention complaint. RemRand alleged that by virtue of the foregoing facts, an enforceable preliminary contract had come into being between itself and the Swiss concern, which contract was to be mutually carried out and executed by the parties upon the successful release to Interhandel, by the Alien Property Office, of the seized GAF stock.

13. RemRand in its intervention complaint (R. 2) asked the district court for a declaratory judgment to the effect that, *if the district court should find Interhandel "entitled to the return of such shares"*, then RemRand would be entitled to a decree against Interhandel enforcing such contract.

14. It was proved at the intervention trial and was found as a fact by the district court (R. 35) that under Swiss law no consideration was necessary to support the preliminary contract above mentioned between RemRand and Interhandel; and that an offer made for a certain period of time (as the Swiss offer was) is binding until the period, for which the offer has been given, has expired.

Interhandel's Main Defenses.

As the opinion of the Court of Appeals shows (R. 401-402), Interhandel interposed three main defenses to RemRand's intervention complaint, which may be summarized as follows:

1. It was first contended that the Swiss Offer, as formulated in its oral "Declaration of Readiness"

[9] The Minutes of Interhandel for April 21, 1947 (R. 355 to 358) make this point entirely clear.

made to RemRand, did not constitute a *binding offer* under Swiss law, even for the period for which it was expressly specified; but was a mere "gentlemen's agreement," not enforceable in the courts. The evidence however shows conclusively that no mention or even intimation to that effect was made by Interhandel either in the recitals of its oral "Declaration of Readiness" of June, 1946, or in its written Minutes of May, 1946, which had authorized that offer.[10]

2. It was next contended by Interhandel that its offer to RemRand was made upon certain "conditions precedent", and that these conditions were not only precedent to the execution and carrying out of the contract by RemRand, but were actually *precedent* to any *acceptance* by RemRand. In other words it was contended that RemRand was somehow required to secure the full release of the GAF stock from the Alien Property Office, before RemRand could even make a binding acceptance of the Swiss offer. Here again the evidence showed that this "condition precedent" contention was a complete after-thought on the part of Interhandel and was a plain *ante litem motam* contention.[11]

3. Finally it was contended by Interhandel that its proposed contract to RemRand could only be accepted by the Remington Rand corporation *per se;* and that the actual acceptance by RemRand through one of its subsidiaries was insufficient. This contention was made in spite of the fact (a) that the Swiss Minutes of May, 1946, specifically authorized the offer to be made "to an American group which is interested" (R. 336)—meaning the RemRand group; and in spite of the fact (b) that the Swiss "Declaration of Readiness"

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[10] The evidence shows that the first time the term, "gentlemen's agreement," appears in the Swiss Minutes is in the recitals for the meeting of January 16, 1947, (R. 357-9) more than six months after the offer to RemRand had been made.

[11] The evidence conclusively shows that the first time the term "conditions precedent" (or anything like it) was used by Interhandel was in its Minutes of May 17, 1947, (R. 362); where in a cablegram to be sent that day to Mr. James H. Rand, Interhandel for the first time referred to the "main conditions precedent" of the Swiss offer. By that time the controversy had already arisen.

of June, 1946, was made by Interhandel to "one of the groups" represented by RemRand (R. 391). Moreover as early as the first days of January, 1947, RemRand had submitted to Interhandel in writing the name of its proposed subsidiary that would accept the Swiss offer, and Interhandel at no time made any objection to that plan, until after the acceptance had been actually made. Here again the evidence shows that this particular defense is likewise a complete after-thought on the part of Interhandel.[12]

III. INTERHANDEL'S ARGUMENT.

The argument of Interhandel in several respects is recklessly misleading. For example on page 14 of its brief, it argues, "If the complaint (in intervention) was lacking in merit, as was found to be the case, then the intervention litigation was 'in the nature of a strike suit' (R. 394, 396)."

The district court was probably familiar with the term, "strike bill." Webster gives as one of the definitions of the noun, "strike," the following:

> Act of obtaining or attempting to obtain money by importunity or any form of blackmail or threat, esp. by introducing in a legislature a bill (strike bill) which would be harmful to a person or corporation if enacted into law in order to obtain a bribe for withdrawing it.

Would counsel for Interhandel have this Court believe that every action in which the claim for relief is defeated is a strike suit? Or that the district court used the term in that sense, and thus prejudged the case? Or is the argu-

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[12] Interhandel's Minutes themselves (R. 347-49) show that as early as January 8, 1947, RemRand had submitted to Interhandel documents concerning its proposed acceptance which gave the name of the RemRand subsidiary (American Aniline and Chemical Co.) which it was proposed would make the actual acceptance of the Swiss offer. Moreover extended negotiations about those preliminary documents were had between RemRand's attorney and the Swiss officials in Switzerland in March, 1947, (R. 379 to 390); and testimony of Mr. Garey for RemRand, (Dist. Ct. Tr. 733), at which time the name of the proposed subsidiary was again repeatedly discussed.

ment merely a device to draw attention from the departures of the trial court from the usual and accepted course of judicial proceedings?

For it is beyond controversy that the suggestion that this was in the nature of a strike suit is just as contrary to fact and without any support in the evidence as is the baseless suggestion that the property involved was in the nature of being perishable. (See Pet., p. 10, 11 and footnote 7). It is equally obvious that a separate trial of the intervention issues would not have been ordered except for these reckless misrepresentations. Interhandel reaches the conclusion that separate trials were inevitable and justifies the premature trial of the intervention issues as an exercise of judicial discretion, "governed by the facts". (Respondents Br. pp. 14, 15). But, as we have shown, there were no facts; and there was no evidence to show that the order for a separate trial was "in furtherance of convenience and to avoid prejudice" as required by Rule 42(b). On the contrary, the petitioner was seriously inconvenienced and prejudiced. And neither the Government nor Interhandel asked for a separate trial.

The trial court, as pointed out in our petition (Pet. p. 10), could have saved expense and avoided prejudice by first determining whether or not Interhandel is entitled to the return of its property. If not, then the claim of the petitioner, Remington Rand, falls, and the long trial of the intervention issues would have been avoided. The separate trial of the intervenor's claim after the trial of the main action would have been a just exercise of discretion under Rule 42(b). The premature, separate trial of the intervention issues was an abuse of discretion so clear and so serious as to present error apparent on the face of the record which this Court may and should correct, even if objection was not made at the trial.

IV. THE GOVERNMENT'S ARGUMENT.

The Solicitor General opens his argument by making a contention which is wholly without merit. He says at page 7 of his brief that the trial judge "supplied a clerical omission in its record after the appeal was taken, by inserting into its judgment, *nunc pro tunc*, its earlier determination that there was no just reason for delay, in compliance with F. R. C. P. Rule 54(b)."

The finding of no just cause for delay is a judicial finding which was not made by the district court when judgment was entered. (R. 37). There is nothing in this record to indicate an omission on the part of the clerk. The omission was that of the trial judge. The motion of Interhandel for the *nunc pro tunc* order states that the trial court "made no express determination that there was no just reason for delay", and that "it is conceivable that Rule 54(b) could be deemed applicable." The order of the trial court recites, "Upon consideration of the motion of plaintiff * * * for an Order *Nunc Pro Tunc*, and having expressly determined *prior to* and at the time of the entry of the final judgment herein that there was no just reason for delay * * *". (R. 413, 414). (Emphasis supplied.) There was no expression by the court as to a determination of "no just reason for delay" at the conclusion of the trial or at any time thereafter until Interhandel made its motion for a *nunc pro tunc* order.

The words "prior to"[13] were obviously inserted to justify and strengthen the *nunc pro tunc* order. We infer that the hand that drafted the order also drafted the motion (R. 408-410). Indeed, the motion (R. 409) quotes and relies upon the language of the court's memorandum of December 21, 1949, (R. 396). Neither at the conclusion of the trial nor on April 26, 1950, when judgment was entered

[13] See Government's Brief p. 6 wherein this "prior to" theory has its seed; namely, on December 21, 1949, (R. 394)—four months before the trial court entered judgment dismissing RemRand's complaint of intervention, April 26, 1951.

(R. 37), was any finding of no just reason for delay made, or suggested, by the judge or counsel. Rule 54(b) declares that the "court may direct the entry of a final judgment only *upon* an express determination that there is no just reason for delay." (Pet. pp. 4, 5). Manifestly, this determination should be made and recorded simultaneously with the entry of judgment but certainly not at a time prior to trial.

The somewhat specious argument that the *nunc pro tunc* order might be authorized by Rule 75(h) is not seriously pressed. Indeed, it lacks any quality of persuasion. The motion (R. 408) does not refer to it. Rule 75(h) gives the trial court power to correct the record. The record in the case at bar did not need correction. It was the accurate record of what occurred during and at the close of the trial. The *nunc pro tunc* order merely distorted it.

Apparently, the Solicitor General is of the view that the serious, weighty, undecided question of Federal law posed by petitioners Point III is best brushed aside by ignoring most of the cases cited by us in support of the clear, sharp conflicts on the points involved between the various courts of appeal. The Government's brief does not even mention this Court's opinion in *Dickinson* v. *Petroleum Conversion Corp.*, (1950) 338 U. S. 507, discussed in petitioner's brief at pages 18, 19 and 20, with reference to the application of Rule 54(b) to separate judgments dismissing complaints of intervention.

The petitioner asserts that the *nunc pro tunc* order was an illegal attempt to give the appellate court jurisdiction which otherwise did not exist. The Government seeks to avoid this obvious truth by a series of hedge-hopping and inconsistent conclusions. Thus, pages 8 and 9 of its brief suggest that it is doubtful whether explicit leave of the appellate court was required to authorize the *nunc pro tunc* order, but that in any event the consideration of the appeal was a tacit approval or ratification which is the equivalent of express leave of court, and in support cites *Vale* v. *Bonnett*, C.A.D.C. 1951, 15 Fed. Rules Serv. 54(b) 4.

In the *Vale* case, after argument and following a suggestion from the bench, appellant was allowed time for the preparation of a supplemental brief on the point of lack of compliance with Rule 54(b). To his brief, appellant attached an "Order Correcting and Amending Order for Summary Judgment Nunc Pro Tunc." Upon this order, counsel for both parties "endorsed their consent."

In that case the court below labored under the misapprehension that the case at bar was in all respects similar and that the consent of the parties to the *nunc pro tunc* order was equivalent to compliance with Rule 54(b).[14]

The cases are not at all similar. In the case at bar there was no consent to the *nunc pro tunc* order. On the contrary, petitioner opposed the order (R. 411-413).[15] In the *Vale* case both parties endorsed their consent on the order which was entered after argument in the appellate court. In that case the judgment of the district court was reversed, thereby rendering moot the question of compliance with Rule

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[14] The court in *Vale* v. *Bonnett*, said:

> "The issue thus presented is whether this nunc pro tunc order has so cured the defects in the order as appealed from that we now may consider the appeal upon the merits.
>
> This issue is determined in favor of retaining this appeal following the action taken in (*Remington Rand* v. *Interhandel*) . . . decided March 29, 1951.
>
> Prior to the Remington Rand decision, this court had recently considered Rule 54(b) as applied to situations somewhat differing from that presented here. (Citing *Roberts* v. *American Newspaper Guild*, 188 F. 2d 650; *Felder* v. *Loughran Co.*, 188 F. 2d 623; *David* v. *D. C.*, 187 F. 2d 204.)
>
> The Remington Rand opinion does not mention this issue but the situation there was the same as here in essentials. In that case, Rule 54(b) had not been complied with at the time of appeal but, after the appeal had been docketed here, a nunc pro tunc order (similar to the one here) had been procured *and there was consent thereto by all the parties.* This court, in considering that appeal on the merits, obviously held that Rule 54(b) had been sufficiently complied with." (Emphasis supplied)

[15] Points and authorities in opposition to *nunc pro tunc* order (R. 411).

54(b). In this case the order was made after appeal but before argument and the judgment was affirmed.

In view of the admission by the court below in the *Vale* case that prior to the *Remington Rand* decision it had considered Rule 54(b) as applicable to situations differing somewhat[16] from that there presented, only one conclusion can be reached: *In some cases non-compliance with Rule 54(b) will require dismissal for want of jurisdiction. In other cases jurisdiction may be conferred by consent of the parties to a nunc pro tunc order entered pending appeal.*

The fact that there is no guide by which the distinction may be assessed is already indicated by the action of other courts of appeal. For example, the Second Circuit has held that where Rule 54(b) is not complied with, there is no jurisdiction of the appeal. *Flegenheimer* v. *Manitoba Sugar Co.*, 182 F. 2d 742; *Kaufman & Ruderman* v. *Cohn & Rosenberger*, 177 F. 2d 849; *Tobin Packing Co.* v. *North American Car Corp.*, 188 F. 2d 158; *Republic of China* v. *American Express Co. Inc.*, July 17th, 1951, 15 Fed. Rules Serv. 54b 4, Case No. 7; *Lyman* v. *Remington Rand*, 188 F. 2d 306.

In all of these cases, including the case last cited which involved petitioner[17], the appeals were dismissed despite the fact that in at least one of these cases the absence of the determination and direction required by the rule resulted from obvious inadvertence.[18]

Since the decision here sought to be reviewed, this Court

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[16] In the *Roberts* case, *supra*, the absence of the express determinations under the Rule was ground for dismissal of the appeal, the court below stating its concurrence with *Etten* v. *Kauffman*, CCA 3, 179 F. 2d 302; in the *Felder* case, the court below dismissed, *per curiam*, an appeal for want of jurisdiction for lack of compliance with Rule 54(b), this on the authority of its earlier decision in *David* v. *District of Columbia*, 187 F. 2d 204.

[17] *Lyman* v. *Remington Rand* (C. A. 2) 188 F. 2d 306.

[18] In the *Republic of China* case, *supra*, the Court recognized this. Compare to the question in the case at bar where a finding of no just reason for delay is a very real issue—an issue upon which, we contend, the irregular procedure in this case resulted in grave prejudice to petitioner.

has granted a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in the case of *Gem Mfg. Co., Petitioner,* v. *Packard Motor Car Co., Respondent,* October Term 1951, No. 21, which involves the applicability of Rule 54(b) to appeals taken under Section 1292 (1). It should be pointed out that the appeal in this case was taken under Section 1291, and therefore a decision in the *Gem Mfg. Co.* case will not be controlling as regards appeals under Section 1291, unless this Court should hold that Rule 54(b) is applicable to appeals under both Sections 1291 and 1292(1). Even in that event the questions here presented differ from those in the *Gem Mfg. Co.* case because there no attempt was made to shore up the district court record by a *nunc pro tunc* order. The Seventh Circuit, as far as appeals under Section 1291 are concerned, has aligned itself with those circuits which hold that when Rule 54(b) has not been complied with, orderly procedure requires that the appeal be dismissed, leaving to the discretion of the district court its further action in the premises. *Packard Motor Car Co.* v. *Gem Mfg. Co.,* 187 F. 2d 65; *Winsor* v. *Daumit,* 179 F. 2d 475. In the *Winsor* case, *supra,* at 478, the court said:

> "In view of the fact that the rule itself defines the power and function of the district court, orderly procedure requires that we dismiss the appeal, leaving to the discretion of the district court its further action in the premises."

The Government begs the question when it asserts in its footnote at page 8 that the district court in the case at bar complied with Rule 54(b). The facts are otherwise. The *nunc pro tunc* order was of no effect if jurisdiction, as a concept, means power to determine the issues. The anomaly here makes this difficult to explain; however, it is clear that by virtue of the docketing of this case in the Court of Appeals, the district court could not act until the Court of Appeals either dismissed the appeal or expressly empowered the district court to make a determination while the

case was still pending on appeal. Equally, the Court of Appeals had no jurisdiction to render a decision on the district court's order from which the appeal was taken because it was interlocutory and had not been made appealable. However, its course was clear, namely, dismissal of the appeal. 2d Cir. *Republic of China* v. *American Express Co. Inc.; Tobin Packing Co.* v. *North American Car Corp.; Lyman* v. *Remington Rand;* 3d Cir., *Etten* v. *Kauffman;* 7th Cir., *Packard Motor Car Co.* v. *Gem Mfg. Co.; Winsor* v. *Daumit;* all *supra.*

The efect of this *nunc pro tunc* procedure is, to say the least, confusing. The question arises as to when, if ever, is an appeal perfected beyond the reach of the trial court. Must the courts of appeal sit by and wait for *nunc pro tunc* orders beyond the prescribed time for perfecting appeals? The courts in other circuits have given the answer by dismissing the appeals where the trial court has not complied with Rule 54(b) at the time the appeal is taken. In some instances they have indicated that on a subsequent appeal, they would not require a reprinting of the record and briefs. The Court of Appeals for the District of Columbia has clearly indicated its own confusion regarding the present case and has increased the jurisdictional hazards by misconstruing its decision in the *Remington Rand* case, in its subsequent decision in *Vale, supra.*

The purpose of Rule 54(b) is to make clear what interlocutory orders in multiple-claim proceedings are appealable. This purpose should not be defeated by such deviation from orderly procedure as is apparent in the case at bar. This Court has the power to enlighten the courts, the bar and litigants as to what they should, can and indeed, must do—if they are to comply with and have their rights accorded to them by the Federal Rules of Civil Procedure. Lest rights be prejudiced and justice miscarry in the future in proceedings involving Rule 54(b), we respectfully urge the Court to grant this petition, and by its decision make clear what procedure the courts of appeal should follow where an appeal is taken without compliance with Rule

54(b) and at the same time direct the lower court to remand the case to the district court to correct the prejudicial errors which occurred there. These include the Court's action *sua sponte* in setting the intervening petition for trial before it was at issue and far in advance of the main case; the court's erroneous rulings on the admission and exclusion of evidence; and the manifest and flagrant errors in the trial court's Findings of Fact and Conclusions of Law.

Respectfully,

WILLIAM P. MACCRACKEN, JR.,
Attorney for Petitioner.

Of Counsel,
URBAN A. LAVERY,
WILLIAM W. BARRON,
FRANK C. STERCK.

Office-Supreme Court, U.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 148.

REMINGTON RAND INC., *Intervenor-Petitioner*,

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. etc. (Interhandel), *Plaintiff-Respondent*,

and

J. HOWARD MCGRATH, Attorney General of the United States as Successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, Treasurer of the United States, *Defendants-Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITION FOR REHEARING AFTER DENIAL OF CERTIORARI.

WILLIAM P. MACCRACKEN, JR.,
Attorney for Petitioner.

Of Counsel:
URBAN A. LAVERY,
WILLIAM W. BARRON,
FRANK C. STERCK.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

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REMINGTON RAND INC., *Intervenor-Petitioner,*

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SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. etc. (Interhandel), *Plaintiff-Respondent,*

and

J. HOWARD MCGRATH, Attorney General of the United States as Successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, Treasurer of the United States, *Defendants-Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITION FOR REHEARING AFTER DENIAL OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable, the Associate Justices of the Supreme Court of the United States:

The petitioner, Remington Rand Inc., petitions for a rehearing after the denial of its petition for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit.

This petition is based upon intervening facts and circumstances of substantial effect in compliance with Rule 33 of this Court.

1. The petition for a writ of certiorari was filed June 26, 1951. The petitioner's reply brief to the respondents' briefs in opposition was filed August 23, 1951. At that time and until September 28, 1951, there was before this Court the record in the case of *Gem Manufacturing Co.* v. *Packard Motor Car Co.,* 187 F. 2d 65 to review which this Court had granted its writ of certiorari on May 14, 1951, 341 U. S. 930 and which was No. 21 on the calendar of this Court at the October Term, 1951.

The only question involved in that case was the proper construction and application of Rule 54(b), Federal Rules of Civil Procedure, which has been a source of conflict and confusion in the courts of appeals and the district courts as is shown in our petition in the case at bar. (Pet. pp. 17-21) In the *Gem Manufacturing* case, the Court of Appeals of the Seventh Circuit applied Rule 54(b) in a manner directly in conflict with the application of the same rule to a similar issue by the Court below in this case.

On September 28, 1951, while the petition in the case at bar was before this Court for consideration, the case of *Gem Manufacturing Co.* v. *Packard Motor Car Co., supra,* was settled and a stipulation for dismissal was filed. Consequently there will be no decision upon the construction and effect of Rule 54(b) by this Court in that case.

Regardless whether the judgment in that case had been affirmed or reversed, this Court undoubtedly would have used language in its opinion delineating the scope and application of this rule, thereby disposing of some if not all of the questions relating to Rule 54(b) presented in the case at bar, as well as deciding the question left unsettled in the *Dickinson* case, 338 U. S. 507.

On October 15, 1951, this Court granted the petition of *Kaufman, et al.* v. *Interhandel, et al.,* for a writ of certiorari, No. 172, October Term, 1951, to review an order dis-

missing their petition for leave to intervene in the case at bar. That petition does not involve the clarification of Rule 54(b) as does our petition in No. 148. The order granting that petition does, however, effectively and conclusively preclude any early determination of the main case in which Remington Rand Inc., the petitioner here, seeks to establish its claim in intervention. In other words, our petition for rehearing cannot possibly produce any greater delay in the trial or settlement of the main action than has already been caused by the order granting the writ in No. 172.

3. June 25, 1951, the Minnesota Supreme Court adopted Rules of Procedure for the district courts of Minnesota effective January 1, 1952 (232 Minn. following p. 486). These rules were patterned after the Federal Rules of Civil Procedure and include Rule 3-54-2 and Rule 3-42 which are substantially identical with Rules 54 and 42 of the Federal Rules of Civil Procedure. The Minnesota Bar Association held an Institute in St. Paul, October 19, 20, 1951, to discuss procedure under the new rules. The bulletin of that association recognizes that until local precedents are available, the decisions of United States Courts under the Federal Rules of Civil Procedure will be the precedents to be followed.

This is not an unforseen development. The Advisory Committee and the proponents of a simplified procedure agreed that one of the important purposes to be accomplished by the rules was that they should serve as a model for adoption by the states. Only by general state adoption can true conformity in matters of procedure be attained.

Thus is made plain the importance of an early decision by this court announcing the proper construction of Rule 54(b) and deciding the questions presented by our petition; namely, whether an order or judgment dismissing a claim in intervention is appealable without an express finding that there is no just reason for delay as required by Rule 54(b) and whether such omission can be cured after a case

is at issue in the Court of Appeals by a *nunc pro tunc* order without permission of the appellate court.

The proper application of Rule 54(b) was left undecided by this Court in *Dickinson* v. *Petroleum Conversion Corporation*, 338 U. S. 507, as stated in our petition (p. 18) and the conflicting and confusing holdings of our courts of appeals are there discussed (pp. 17-20).

If No. 21, the case of *Gem Manufacturing Co.* v. *Packard Motor Car Co., supra*, had remained on the calendar for decision, the urgency of a clarifying opinion in the case at bar would not be so great. However as far as counsel has been able to ascertain, there is not now pending before this Court any other case involving Rule 54(b). Thus the instant case presents the only immediate opportunity for this Court to decide the important questions left unsettled. Until this is done, it will be impossible for the courts of those states which have adopted a rule similar to 54(b) to follow the conflicting decisions of the United States courts in their application of this rule.

The Court should not refuse review of any case involving a question of importance and difficulty in the correct interpretation of the Federal Rules of Civil Procedure as to which the courts of appeals and the district courts are utterly confused and which this Court has not yet settled. Trial courts and, on occasion, courts of appeals, may take a superficial view of questions of procedure and, by empirical devices, sanction evasions of the rules and departures from the practice prescribed by the rules. But this Court should not withhold its judgment upon questions of such far-reaching importance as those properly presented in the case at bar.

Conclusion.

We earnestly urge this Court to grant our motion for rehearing; to reconsider our petition for a writ of certiorari; and to grant the writ in order that the important questions of federal law, as yet unsettled, may be decided and that

the other errors pointed out in our petition and reply may be corrected.

Respectfully submitted,

WILLIAM P. MACCRACKEN, JR.,
Attorney for Petitioner.

Of Counsel:
URBAN A. LAVERY,
WILLIAM W. BARRON,
FRANK C. STERCK.

Certificate of Counsel.

I certify that I am counsel for petitioner and that the foregoing petition is presented in good faith and not for delay. I also certify that the petition is restricted to the grounds specified in Rule 33 as amended.

WILLIAM P. MACCRACKEN, JR.,
Attorney for Petitioner.

Washington, D. C.,
October 22, 1951.

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IN THE

Supreme Court of the United States

October Term 1951

No. 148

REMINGTON RAND, INC., *Intervenor-Petitioner,*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., Etc. (Interhandel), *Plaintiff-Respondent,*

and

J. HOWARD MCGRATH, Attorney General of the United States as Successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, Treasurer of the United States, *Defendants-Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

RESPONSE OF PLAINTIFF-RESPONDENT TO PETITION FOR REHEARING AFTER DENIAL OF CERTIORARI.

JOHN J. WILSON,
DONALD HISS,
Attorneys for Plaintiff-Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

October Term 1951

No. 148

REMINGTON RAND, INC., *Intervenor-Petitioner,*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., Etc. (Interhandel), *Plaintiff-Respondent,*

and

J. HOWARD MCGRATH, Attorney General of the United States as Successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, Treasurer of the United States, *Defendants-Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

RESPONSE OF PLAINTIFF-RESPONDENT TO PETITION FOR REHEARING AFTER DENIAL OF CERTIORARI.

Societe Internationale Pour Participations, etc., plaintiff-respondent, submits that none of the three reasons advanced by Remington-Rand, Inc., in support of its petition

for rehearing after denial of certiorari satisfies the requirements of Rule 33 of this Court.

Petitioner's principal ground for rehearing (after denial of certiorari) is that since this Court has lost the opportunity to examine Rule 54(b) of the Federal Rules of Civil Procedure, because *Gem Manufacturing Co.* v. *Packard Motor Car Co.*, October Term 1951, No. 21 was dismissed by stipulation of the parties after the grant of certiorari, the Court should allow certiorari in the instant case, in which 54(b) is also involved.

Petitioner's thesis in effect is that this Court should construe the Rules whenever the chance to do so arises, in order to provide guides for other courts and lawyers, whether or not the question involved in the particular case deserves consideration.

Strangely enough, petitioner implies that if the *Gem Manufacturing* case had not been otherwise disposed of by the parties, there would be no ground for the instant petition to rehear.

Petitioner asserts that the Court of Appeals for the Seventh Circuit, in the *Gem Manufacturing* case, "applied Rule 54(b) in a manner directly in conflict with the application of the same rule to a similar issue by the Court below in this case." (Rehearing Pet., p. 2); and petitioner also contends that, absent the stipulation of dismissal, "this Court undoubtedly would have used language in its opinion delineating the scope and application of this rule, thereby disposing of some, if not all, of the questions relating to Rule 54(b) presented in the case at bar . . ." (Rehearing Pet., p. 2). These statements are made by petitioner, despite the fact that in its reply brief, petitioner conceded the lack of conflict between these two decisions, stating categorically that "a decision in the *Gem Manufacturing Co.* case will not be controlling as regards appeals under Section 1291, unless this Court should hold that Rule 54(b) is applicable to appeals under both sections 1291 and 1292(1). Even in that event the questions here presented

differ from those in the *Gem Manufacturing Co.* case because there no attempt was made to shore up the district court record by a *nunc pro tunc* order." (Reply Br., p. 15.)

The two cases are as unlike as night and day, and the questions respectively involved, as they relate to Rule 54(b), reflect instantly the presence of importance in the one and the lack in the other. In the *Gem Manufacturing* case the Circuit Court of Appeals had denied the maintenance of an appeal under 28 U.S.C. 1292(1) from an interlocutory order, where the District Judge had not made the determination and direction which are prescribed by Rule 54(b) in relation to a "final judgment" in a case involving multiple claims. 187 F. 2d 65. The very statement of this proposition establishes its importance.

In the case at bar, the judgment—dismissing a complaint in intervention after a full trial on the merits—was plainly inherently "final" in character, and petitioner lost nothing by the *nunc pro tunc* determination of the trial judge. Petitioner, as appellant in the court below, initially prosecuted its appeal in the absence of the determination in the record. Respondent, Societe, as appellee, before argument in the Court of Appeals brought about the *nunc pro tunc action* to aid—not to interfere with—petitioner's prosecution of its appeal. Petitioner's appeal was *not* dismissed or otherwise procedurally impeded.

The anomaly presented by the petitioner is as follows: It made timely prosecution of its appeal. It was not misled by Rule 54(b) to its prejudice. The Court of Appeals received and decided its appeal on the merits. Petitioner sought to destroy its own appeal, and complains because the Court of Appeals would not permit this to be done.

Petitioner refers to the grant of certiorari on October 15, 1951 in *Kaufman et al.* v. *Societe Internationale Pour Participations, etc. et al.*, October Term 1951, No. 172, as its second reason for rehearing, asserting that its petition for rehearing "cannot possibly produce any greater delay in the trial or settlement of the main action than has already

been caused by the order granting the writ in No. 172." (Rehearing Pet., p. 3.) Whether review by this court of petitioner's claim of intervention would delay settlement or trial of the main case is irrelevant to the merits of this petition. This is apparent from the fact that avoidance of delay has not been suggested by respondent as a reason for denying the petition.

Petitioner's irrelevant reference, as a third ground, to the adoption of rules of procedure by the Minnesota Supreme Court prompts the rhetorical question as to whether petitioner seeks, by such indirection, to aid itself or the State of Minnesota?

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for rehearing after denial of certiorari should be denied.

JOHN J. WILSON,
DONALD HISS,
Attorneys for Plaintiff-Respondent, Societe Internationale Pour Participations, Etc.

November 2, 1951